Supreme Court, U.S.
FILED
JAN 24 2001
OFFICE OF THE CLERK

(16)

No. 00-276

# In the Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
PETITIONERS

*v.*

UNITED FOODS, INC.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SIXTH CIRCUIT*

## JOINT APPENDIX

BARBARA D. UNDERWOOD
*Acting Solicitor General*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*
*Counsel of Record*
*for Petitioners*

LAURENCE H. TRIBE
*Hauser Hall 420*
*1575 Massachusetts Avenue*
*Cambridge, MA 02138*
*(617) 495-4621*
*Counsel of Record*
*for Respondent*

**PETITION FOR WRIT OF CERTIORARI FILED: AUGUST 18, 2000**
**CERTIORARI GRANTED: NOVEMBER 27, 2000**

244 pp

TABLE OF CONTENTS


| | Page |
|---|---|
| Docket Entries: | |
| United States District Court for the Western District of Tennessee: | |
| Case No. 96-CV-1252 | 1 |
| Case No. 98-CV-1082 | 13 |
| United States Court of Appeals for the Sixth Circuit | 18 |
| United States Department of Agriculture Decisions in *In re United Foods, Inc.*, MPRCIA Docket No. 96-0001: | |
| Administrative Law Judge's Decision | 27 |
| Judicial Officer's Decision | 32 |
| Complaint in *United States* v. *United Foods, Inc.*, No. 96-1252 | 55 |
| Complaint in *United Foods, Inc.* v. *United States*, No. 98-1082 | 61 |
| Exhibit to United States' Memorandum in Support of Motion to Dismiss and of Motion for Summary Judgment: | |
| United States Department of Agriculture Program Announcement, "Mushroom Industry Votes to Continue Promotion Program" | 79 |
| Exhibits to Declaration of Brian Leighton in Opposition to Motion for Summary Judgment: | |
| United States Department of Agriculture Decisions in *In re Donald B. Mills, Inc.*, MPRCIA Docket No. 95-1: | |
| Administrative Law Judge's Decision | 81 |
| Administrative Law Judge's Decision on Respondent's Motion for Reconsideration | 106 |

TABLE OF CONTENTS—Continued: Page

Excerpts from Transcript of Administrative Hearing in *In re Donald B. Mills, Inc.*, MPRCIA Docket No. 95-1:
Testimony of Wade Whitfield ..... 118
Testimony of Robyn Wilk ..... 132
Testimony of John Haltom ..... 137
Summary of Telephone Conference in *In re United Foods, Inc.*, MPRCIA Docket No. 96-0001 ..... 192
Affidavit of Donald Dresser ..... 194
Mushroom Council Annual Report 1997 ..... 206

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE (JACKSON)

Civil No. 96-CV-1252

UNITED STATES

*v.*

UNITED FOODS, INC.

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 10/16/96 | 1 | COMPLAINT (Summons(es) issued) (gn) [Entry date 10/17/96] [1:96cv1252] |
| 11/6/96 | 2 | MOTION by USA for summary judgment or, in the alternative, for a preliminary injunction - CJT wpo (pb) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 11/6/96 | 3 | MEMORANDUM by USA in support of motion for summary judgment (2-1), of motion for a preliminary injunction [2-2] w/attmts: declaration of Wade Whitfield; report; cpy of check - CJT (pb) [1:96cv1252] |
| 11/29/96 | 4 | NOTICE OF FILING OF WAIVER OF SERVICE OF SUMMONS by defendant United Foods, Inc. w/attd waiver - CJT (pb) [Entry date 12/02/96] [1:96cv1252] |
| 1/14/97 | 5 | ANSWER by defendant United Foods, Inc. to cmplt [1-1] - CJT (pb) [1:96cv1252] |
| 1/14/97 | 6 | MOTION by defendant to stay proceedings w/attmt: COA decision, 9th Cir. - CJT (pb) [1:96cv1252] |
| 1/14/97 | 7 | MOTION by defendant to file a memorandum in excess of page limitation - CJT wpo (pb) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 1/14/97 | 8 | RESPONSE by defendant to motion for summary judgment [2-1], to motion for a preliminary injunction [2-2] - CJT (pb) [1:96cv1252] |
| 1/14/97 | 9 | BRIEF IN OPPOSITION by defendant regarding motion for sum jgm [2-1], regarding motion for prel inj [2-2] - CJT (pb) [1:96cv1252] |
| 1/14/97 | 9 | BRIEF by defendant in support of motion to stay [6-1] - CJT (pb) [1:96cv1252] |
| 1/14/97 | 10 | DECLARATION by defendant in support of dft's opposition [9-1] to plt's motion for sum jgm or, in the alternative, for prel inj w/attd Exhs: 1. United Food's administrative peition; 2. Admin Law Judge decision; 3. ALJ's decision on respondent's motion for reconsideration; 4. excerpts from transcript of Mills hearing; 5. - ALJ's "Summary of Telephone Conference" - CJT (pb) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 1/14/97 | 11 | SETTING LETTER: scheduling conference set for 2/13/97 at 11:00 before MagJBreen Rm 320 Fed Bldg Jackson (bph) [1:96cv1252] |
| 1/29/97 | 12 | SETTING LETTER: scheduling conference reset for 2/24/97 at 9:30 before Mag J Breen (bph) [Entry date 01/30/97] [1:96cv1252] |
| 2/6/97 | 13 | ORDER by Judge James D. Todd granting motion to file a memorandum in excess of page limitation [7-1] - CJT (cc: all counsel) (pb) [Entry date 02/07/97] [1:96cv1252] |
| 2/11/97 | 14 | ORDER by Judge James D. Todd granting dft United Foods motion to stay proceedings [6-1], CASE STAYED (cc: all counsel) (skp) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 2/14/97 | 15 | REPLY by USA to response to motion for summary judgment [2-1], motion for a preliminary injunction [2-2] w/attmts: A. opinion/order USDC WD/MI; B. summary of teleconference—stay order; C. transcript; D. USDA report re mushrooms - CJT (pb) [1:96cv1252] |
| 3/7/97 | 16 | MEMORANDUM by plaintiff in support of plt's motion for reconsideration of stay order - CJT wpo (pb) [1:96cv1252] |
| 3/18/97 | 17 | RESPONSE TO THE MOTION FOR RECONSIDERATION by defendant - CJT (pb) [1:96cv1252] |
| 3/20/97 | 18 | ORDER DENYING MOTION FOR RECONSIDERATION by Judge James D. Todd re Memorandum in support of Plaintiff's Motion for Reconsideration of Stay Order[16-1] (cc: all counsel)CJT (bph) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 2/17/98 | 19 | ORDER by Judge James D. Todd stay lifted and granting addtnl time to file supplmtl memoranda. The court hereby allows the United States an addtnl twenty (20) days in which to file a supplmtl memo in support of USA's motion for sum jgm, or in the alterantive [sic] for prel inj. United Foods will then have twenty (20) days in which to respond - CJT (cc: all counsel) (pb) [Entry date 02/18/98] [1:96cv1252] |
| 3/23/98 | 20 | MOTION by defendant to consolidate cases w/Exh: A. cmplt in action 98-1082 - CJT (pb) [1:96cv1252] |
| 3/27/98 | 21 | MOTION by defendant United Foods, Inc. for attorney Bradley A. MacLean to appear pro hac vice w/cert of good standing - CJT wpo (pb) [Entry date 03/30/98] [Edit date 03/30/98] [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/27/98 | 22 | PRO HAC VICE FEE PAID: in the amount of $10.00 receipt # 19095 by Farris, Warfield & Kanaday on behalf of atty Bradley A. MacLean (pb) [Entry date 03/30/98] [1:96cv1252] |
| 3/27/98 | 23 | ORDER by Judge James D. Todd granting motion for attorney Bradley A. MacLean to appear pro hac vice [21-1] - CJT (cc: all counsel) (pb) [Entry date 03/30/98] [1:96cv1252] |
| 4/17/98 | 24 | ORDER by Judge James D. Todd granting motion to consolidate cases [20-1] 1:96-cv-1252 with member cases 1:98-cv-1082 - CJT (cc: all counsel) (pb) [Entry date 04/20/98] |
| 5/12/98 | 25 | ATTORNEY APPEARANCE for USA by atty Pamela J. Aronson (recd fr Mphs) - CJT (pb) [Entry date 05/15/98] [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 5/21/98 | 26 | MOTION by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 to dismiss, or, in the alterntive [sic], for summary judgment - CJT (pb) [Entry date 05/22/98] [1:96cv 1252 1:98cv1082] |
| 5/21/98 | 27 | MEMORANDUM by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 in support of motion to dismiss [26-1] in 1:98-cv-01082, of motion for summary judgment [26-2]in 1:98-cv-01082 w/Exhs: 1-2. USDC memorandum opinion/orders; 3. order; 4. program announcement; 5. USDA petition; 6. USDA decision/order of dismissal; 7. USDA decision/order - CJT (pb) [Entry date 05/22/98] [1:96cv1252 1:98cv1082] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 6/19/98 | 28 | MOTION by defendant United Foods, Inc. in 1:96-cv-01252, plaintiff United Foods, Inc. in 1:98-cv-01082 to extend time to file resp to the govt's motion to dism - CJT wpo (pb)[Entry date 06/22/98] [1:96cv1252 1:98cv1082] |
| 6/22/98 | 29 | ORDER by Judge James D. Todd granting motion to extend time to file resp to the govt's motion to dism [28-1] in 1:96-cv-01252, 1:98-cv-01082 - CJT (cc: all counsel) (pb) [Entry date 06/23/98] [1:96cv1252 1:98cv1082] |
| 7/9/98 | 31 | RESPONSE by defendant United Foods, Inc. to motion to dismiss [26-1] - CJT (pb) [Entry date 07/13/98] [1:96cv1252] |
| 7/9/98 | 32 | AFFIDAVIT of Donald Dresser w/Exh: A. Mushroom Council 1997 Management Report - CJT (pb) [Entry date 07/13/98] [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 7/9/98 | 33 | MEMORANDUM by defendant in 1:96-cv-01252 in support of motion response [31-1] w/Exh: 1. article by Justice John Paul Stevens, "The Freedom of Speech" - CJT (pb) [Entry date 07/13/98] (1:96cv1252] |
| 7/10/98 | 30 | SETTING LETTER; scheduling conference set for 4:00 7/30/98 Rm 320 Fed Bldg Jackson before MagJBreen (bph) [1:96cv1252] |
| 7/17/98 | 34 | REPLY by USA to response to motion to dismiss [26-1], motion for summary judgment [26-2] w/Exh: 1. US COA opinion (recd fr Mphs 7/20/98) - CJT (pb) [Entry date 07/21/98] [1:96cv1252] |
| 7/27/98 | 35 | SETTING LETTER; scheduling conference reset for 9:15 9/10/98 Rm 320 Fed Bldg Jackson before MagJBreen (bph) [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 7/28/98 | 36 | ORDER by Judge James D. Todd granting motion for summary judgment [26-2], granting motion for summary judgment [2-1] terminating party United Foods, Inc. in 1:96-cv-01252, - CJT wpj, OB (cc: all counsel) (pb) [Entry date 07/29/98] [1:96cv1252] |
| 7/31/98 | 37 | JUDGMENT: in favor of pla USA by Judge James D. Todd dismissing case and (1:98-cv-01082) consolidation termed (cc: all counsel) (skp) [Entry date 08/03/98] [1:96cv1252] |
| 8/12/98 | 38 | MOTION by plaintiff USA to alter or amend jgmt (recd fr Mphs 8/14/98) - CJT (pb) [Entry date 08/14/98] [1:96cv1252] |
| 8/12/98 | 39 | MEMORANDUM by plaintiff USA in support of motion to alter or amend jgmt [38-1] (recd fr Mphs 8/14/98) - CJT (pb) [Entry date 08/14/98] [1:96cv1252] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 8/21/98 | 40 | RESPONSE by defendant United Foods, Inc. to motion to alter or amend jgmt [38-1] - CJT (pb) [Entry date 08/24/98] [1:96cv1252] |
| 9/4/98 | 41 | ORDER by Judge James D. Todd denying motion to alter or amend jgmt [38-1] (cc: all counsel) CJT (bph) [1:96cv 1252] |
| 9/24/98 | 42 | NOTICE OF APPEAL by defendant United Foods, Inc. from Dist. Court decision order [36-2] - CJT (pb) [Entry date 09/25/98] (1:96cv1252) |

* * * * *

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE (JACKSON)

No. 98-CV-1082

UNITED FOODS, INC., PLAINTIFF

*v.*

UNITED STATES AND
DEPARTMENT OF AGRICULTURE, DEFENDANTS

**DOCKET ENTRIES**

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/23/98 | 1 | COMPLAINT (Summons(es) issued) Receipt #: 19076; Filing fee $150.00 - CJT (gn) [1:98cv1082] |
| 3/27/98 | 2 | MOTION by plaintiff for attorney Bradley A. MacLean to appear pro hac vice w/cert of good standing - CJT wpo (pb) [Entry date 03/30/98] [1:98cv1082] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 3/27/98 | 3 | PRO HAC VICE FEE PAID: in the amount of $ 10.00 receipt # 19095 by Farris, Warfield & Kanaday on behalf of atty Bradley A. MacLean (pb) [Entry date 03/30/98] [1:98cv1082] |
| 3/27/98 | 4 | ORDER by Judge James D. Todd granting motion for attorney Bradley A. MacLean to appear pro hac vice [2-1] - CJT (cc: all counsel; B. Quarles) (pb) [Entry date 03/30/98] [Edit date 03/30/98] [1:98cv1082] |
| 4/17/98 | 5 | ORDER by Judge James D. Todd consolidating cases 96-1252 w/98-1082 - CJT (cc: all counsel) (pb) [Entry date 04/20/98] [1:98cv1082] |
| 4/27/98 | 6 | RETURN OF SERVICE executed upon defendant AGRI on 4/6/98, cert mail (pb) [Entry date 04/29/98] [1:98cv 1082] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 4/27/98 | 7 | RETURN OF SERVICE executed upon defendant USA by Atty Genrl J. Reno on 3/30/98, cert mail (pb) [Entry date 04/29/98] [1:98cv1082] |
| 4/27/98 | 8 | RETURN OF SERVICE executed upon defendant USA by USA/V. Coleman on 3/26/98, cert mail (pb) [Entry date 04/29/98] [1:98cv1082] |
| 5/21/98 | 26 | MOTION by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 to dismiss, or, in the alterntive [sic] , for summary judgment - CJT (pb) [Entry date 05/22/98] [1:96cv 1252 1:98cv1082] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 5/21/98 | 27 | MEMORANDUM by govt dft AGRI (US Dept of Agriculture) in 1:98-cv-01082 in support of motion to dismiss [26-1] in 1:98-cv-01082, of motion for summary judgment [26-2] in 1:98-cv-01082 w/Exhs: 1-2. USDC memorandum opinion/orders; 3. order; 4. program announcement; 5. USDA petition; 6. USDA decision/order of dismissal; 7. USDA decision/order -CJT (pb)[Entry date 05/22/98] [1:96cv 1252 1:98cv 1082] |
| 6/19/98 | 28 | MOTION by defendant United Foods, Inc. in 1:96-cv-01252, plaintiff United Foods, Inc. in 1:98-cv-01082 to extend time to file resp to the govt's motion to dism - CJT wpo (pb) [Entry date 06/22/98] [1:96cv1252 1:98cv1082] |

| DATE | DOCKET NUMBER | PROCEEDINGS |
|---|---|---|
| 6/22/98 | 29 | ORDER by Judge James D. Todd granting motion to extend time to file resp to the govt's motion to dism [28-1] in 1:96-cv-01252, 1:98-cv-01082 - CJT (cc: all counsel) (pb) [Entry date 06/23/98] [1:96cv1252 1:98cv1082] |
| 7/28/98 | 30 | ORDER by Judge James D. Todd granting motion for summary judgment [26-2] terminating party AGRI in 1:98-cv-01082, party USA in 1:98-cv-01082 - CJT wpj, OB (cc: all counsel) (pb) [Entry date 07/29/98] [1:98cv1082] |
| 7/31/98 | 31 | JUDGMENT: per order field [sic] 7/28/98 granting motion for summary judgment and judgment entered on behalf of USA by Judge James D. Todd terminating case and terminating case consolidation (cc: all counsel) (skp) [Entry date 08/03/98] [1:98cv1082] |

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

---

No. 98-6436

UNITED FOODS, INC., PLAINTIFF-APPELLANT

*v.*

UNITED STATES OF AMERICA;
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT-APPELLEE

---

**DOCKET ENTRIES**

| DATE | PROCEEDINGS |
|---|---|
| 10/28/98 | Civil Case Docketed. Notice filed by Appellant United Foods Inc. Transcript needed: n (ac) |
| 10/28/98 | BRIEFING LETTER SENT setting briefing schedule: appellant brief due 12/7/98; appellee brief due 1/6/99; reply brief due 1/20/99; appendix due 1/27/99; final briefs due 2/17/99. [98-6436] (ac) |
| 11/12/98 | APPEARANCE filed by Attorney Bradley A. MacLean for Appellant United Foods Inc [98-6436](ac) |

| DATE | PROCEEDINGS |
|---|---|
| 11/12/98 | PRE-ARGUMENT STATEMENT filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac) |
| 11/12/98 | APPEARANCE filed by Attorney Tara Looney Swafford for Appellant United Foods Inc [98-6436] (ac) |
| 11/18/98 | APPEARANCE filed by Attorney August E. Flentje for Appellees Dept of Agriculture, USA [98-6436] (ac) |
| 11/18/98 | APPEARANCE filed by Attorney Barbara C. Biddle for Appellees Dept of Agriculture, USA [98-6436] (ac) |
| 12/10/98 | PROOF BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 12/7/98 Number of Pages: 34. [98-6436] (ac) |
| 12/10/98 | Request to require oral argument filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac) |
| 1/11/99 | PROOF BRIEF filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 1/6/99. Number of Pages: 98. [98-6436] (ac) |

| DATE | PROCEEDINGS |
|---|---|
| 1/11/99 | Request to waive oral argument and submit case on the briefs, (waiver on page: unnumbered), filed by August E. Flentje for Appellee Dept of Agriculture, Appellee USA [98-6436] (ac) |
| 1/22/99 | PROOF REPLY BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 1/20/99 [98-6436] (ac) |
| 2/1/99 | APPENDIX filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 5. Certificate of service date 1/27/99 [98-6436] (ac) |
| 2/18/99 | FINAL BRIEF filed by August E. Flentje for Appellees Dept of Agriculture, USA. Copies: 7. Certificate of service date 2/16/99. Number of Pages: 98. [98-6436] (ac) |
| 2/18/99 | Request to waive oral argument and submit case on the briefs, (waiver on page: un-numbered), filed by August E. Flentje for Appellees Dept of Agriculture, USA [98-6436] (ac) |

| DATE | PROCEEDINGS |
|---|---|
| 2/22/99 | FINAL BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 7. Certificate of service date 2/17/99 Number of Pages: 60. [98-6436] (ac) |
| 2/22/99 | Request to require oral argument filed by Bradley A. MacLean for Appellant United Foods Inc [98-6436] (ac) |
| 2/22/99 | FINAL REPLY BRIEF filed by Bradley A. MacLean for Appellant United Foods Inc. Copies: 7 Certificate of service date 2/17/99 Number of Pages: 18. [98-6436] (ac) |
| 7/13/99 | Oral argument date set for September 23, 1999 in court room 403. Notice of argument sent to counsel. [98-6436] (rld) |
| 8/16/99 | ADDITIONAL CITATION filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 8/12/99 [98-6436] (yh) |
| 8/30/99 | ADDITIONAL CITATION filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date [98-6436] (ac) |

| DATE | PROCEEDINGS |
|---|---|
| 9/23/99 | CAUSE ARGUED on 9/23/99 by Bradley A. MacLean for Appellant United Foods Inc, August E. Flentje for Appellee Dept of Agriculture, Appellee USA before Judges Merritt, Clay, Aldrich. [98-6436] (me) |
| 10/1/99 | ADDITIONAL CITATION filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date none but served. [98-6436] (ac) |
| 10/25/99 | Appellant RESPONSE filed to appellees' additional citations. Response from Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 10/22/99. [98-6436] (mcp) |
| 11/23/99 | OPINION filed: REVERSED decision for publication pursuant to local rule 206. [98-6436] Gilbert S. Merritt, Authoring Judge, Eric L. Clay, Circuit Judge, Ann Aldrich, District Judge. (ac) |
| 11/23/99 | JUDGMENT: REVERSED. (ac) |

| DATE | PROCEEDINGS |
|---|---|
| 12/30/99 | Appellee MOTION filed to extend time to file petition for rehearing until 1/21/00. Motion filed by August E. Flentje and Barbara C. Biddle for Appellee Dept of Agriculture, Appellee USA. Certificate of service date 12/29/99. [98-6436] (yh) |
| 1/3/00 | RULING granting motion to extend time to file petition for rehearing [2075113-1] filed by August E. Flentje, Barbara C. Biddle. Petition to be filed by 1/21/00 for Barbara C. Biddle [98-6436] (yh) |
| 1/20/00 | MOTION filed to allow Amer Mushroom Inst, et al to become an amicus curiae in support of appellees' petition for rehearing en banc. Motion filed by John G. Roberts for Amer Mushroom Inst, et al. Certificate of service date 1/19/00. [98-6436] (blh) |
| 1/20/00 | TENDERED: brief of amicus curiae in support of appellees' petition for rehearing en banc from John G. Roberts for Amer Mushroom Inst, et al. [98-6436] (blh) |

| DATE | PROCEEDINGS |
|---|---|
| 1/21/00 | PETITION for en banc rehearing filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 1/20/00. [98-6436] (blh) |
| 1/21/00 | APPEARANCE filed by Attorney John G. Roberts for Amer Mushroom Inst [98-6436] (blh) |
| 1/27/00 | ORDER filed granting motion of The American Mushroom Institute for leave to file a brief in support of appellees' petition for rehearing en banc [2087184-1] filed by John G. Roberts Jr. [98-6436]. Entered by order of the court. (blh) |
| 1/27/00 | BRIEF filed by John G. Roberts for Amicus Curiae Amer Mushroom Inst. Copies 25. Certificate of service date 1/19/00 (see certificate attached to motion filed 1/20/00). Number of Pages: 15. [98-6436] (blh) |
| 1/27/00 | LETTER SENT by blh to Bradley A. MacLean for Appellant United Foods Inc notifying that party is directed to respond to a petition for en banc rehearing [2087142-1] filed by August E. Flentje and brief of amici curiae filed by John G. Roberts. Response due by 2/10/00. [98-6436]. (blh) |

| DATE | PROCEEDINGS |
|---|---|
| 2/10/00 | Appellant MOTION filed to supplement certified record. Motion filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 2/9/00 [98-6436] (ac) |
| 2/10/00 | RESPONSE to a petition for en banc rehearing [2087142-1] filed by August E. Flentje. Response filed by Bradley A. MacLean for Appellant United Foods Inc. Certificate of service date 2/9/00. [98-6436] (blh) |
| 2/22/00 | LETTER SENT by ac to Bradley A. MacLean for Appellant United Foods Inc regarding ruling on motion to supplement record on appeal. [98-6436]. (ac) |
| 2/22/00 | Appellee RESPONSE in opposition filed regarding a motion to supplement certified record. Response from August E. Flentje for Appellees. Certificate of service date 2/18/2000. [98-6436] (ac) |
| 3/23/00 | ORDER filed denying petition for en banc rehearing [2087142-1] filed by August E. Flentje [98-6436]. Gilbert S. Merritt, Eric L. Clay, Circuit Judges; Ann Aldrich, District Judge. (blh) |

| DATE | PROCEEDINGS |
|---|---|
| 3/30/00 | Appellee MOTION filed to stay mandate. Motion filed by August E. Flentje and Barbara C. Biddle for Appellees Dept of Agriculture, USA. Certificate of service date 3/29/00. [98-6436] (ac) |
| 4/5/00 | ORDER filed granting motion to stay mandate until 5/15/2000 filed by August E. Flentje, Barbara C. Biddle. [98-6436] Gilbert S. Merritt, Eric L. Clay, Circuit Judges, Ann Aldrich, District Judge. (ac) |
| 5/8/00 | Appellee's 2nd MOTION filed to stay mandate until 6/21/2000. Motion filed by August E. Flentje for Appellees Dept of Agriculture, USA. Certificate of service date 5/5/00. [98-6436] (ac) |
| 5/10/00 | ORDER filed denying motion to stay mandate until 6/21/00 pending a decision whether to petition for certiorari filed by August E. Flentje. [98-6436] Gilbert S. Merritt, Eric L. Clay, Circuit Judges, Ann Aldrich, District Judge. (ac) |
| 5/17/00 | MANDATE ISSUED with no cost taxed [98-6436] (ac) |

* * * * *

UNITED STATES DEPARTMENT OF AGRICULTURE BEFORE THE SECRETARY OF AGRICULTURE

---

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC., A DELAWARE CORPORATION, D/B/A PICTSWEET MUSHROOM FARMS, PETITIONER

---

[Filed: Dec 9, 1997]

---

**DECISION AND ORDER OF DISMISSAL**

This proceeding was initiated by a Petition filed by United Foods, Inc., on June 25, 1996, alleging that the Mushroom Promotion Research and Consumer Information Act (7 U.S.C. § 6101 *et seq.*) ("the Act" or "MPRCIA"), and the assessments imposed pursuant to the Act, violate Petitioner's rights guaranteed under the First Amendment of the United States Constitution.

On November 15, 1997, I issued an Order staying this proceeding pending the Supreme Court's resolution of *Glickman v. Wileman* and/or *USDA v. Cal-Almond.* On June 25, 1997, the Court entered its decision in *Glickman v Willeman*, 117 S. Ct. 2130 (1997); and on June 27, 1997, the Court granted certiorari and, vacated the judgment in *USDA v. Cal-Almond Inc.*, and remanded the case to the Ninth Circuit for further consideration is light of *Wileman.* 117 S. Ct. 2501(1997).

On October 21, 1997, Respondent filed a motion to dismiss the Petition in accordance with the *Wileman* decision, which held that the use of mandatory assessments for generic advertising did not abridge freedom of speech within the meaning of the First Amendment. On November 14, 1997, Petitioner filed a written opposition to the motion to dismiss. Petitioner maintains that the holding in *Wileman* is not dispositive of the issues in this proceeding because the MPRCIA is significantly different than the marketing order addressed in *Wileman*, and because *Wileman* did not address the freedom of association claims raised by Petitioner in this instant case.

I disagree with Petitioner. I conclude that *Wileman* is dispositive of the issues herein.

Petitioner contends that the *Wileman* case is distinguishable because the peach and nectarine marketing orders at issue there regulated other aspects of the market, and did not have promotion as their sole purpose as does the MPRCIA. This distinction has twice been rejected by the United States District Court for the Eastern District of California, in cases involving California table grapes and California cut flowers. In *Delano Farms Co. v. California Grape Commission*, the Court held that:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc., is unconvincing. Were

> that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman*] indicates results should differ in "stand alone" advertising programs.

*Delano Farms v. California Grape Comm'n*, CV-F-96-6053 OWWDLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997).

In *Matsui Nursery, Inc. v. California Cut Flower Comm'n*, the Court, as stated during the hearing, held that:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

*Matsui Nursery, Inc.*, Civ No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 6, 1997).

Furthermore, in *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___ (Aug. 27, 1997), the Judicial Officer held that *Wileman* did extend to the MPRCIA, and that it did preclude the petitioner's First Amendment claims with respect to manadatory assessments for generic advertising. *Mills, supra* at 44-48.

Petitioner also argues that the Supreme Court, in *Wileman*, did not sufficiently address the freedom of association issue for the Court's Decision to be binding on that issue. This argument was also rejected in *Delano Farms*, which held that:

> *[Wileman]* was decided on "First Amendment" grounds and addressed association under a federal marketing order. There is no distinction between speech and association in the "ideologically neutral" context of a generic advertising program.

*Delano Farms*, *supra* at 11.

The Judicial Officer also held that neither freedom of association nor freedom of speech are infringed by the MPRCIA. He held:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

*Mills*, *supra* at 48.

Accordingly, the Petition must be dismissed.

**ORDER**

The Petition is dismissed with prejudice.

This Decision and Order of Dismissal shall become final and effective 35 days after its service upon Peti-

tioner unless within 30 days of its service, Petitioner files an appeal pursuant to 7 C.F.R § 900.65.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

December 9, 1997

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

---

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC.,
A DELAWARE CORPORATION, D/B/A
PICTSWEET MUSHROOM FARMS, PETITIONER

---

[Filed: Mar. 4, 1998]

---

**DECISION AND ORDER**

**I. INTRODUCTION**

United Foods, Inc., a Delaware corporation, d/b/a Pictsweet Mushroom Farms [hereinafter Petitioner], instituted this proceeding on June 25, 1996, under the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (7 U.S.C. §§ 6101-6112) [hereinafter the MPRCIA]; the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-.77) [hereinafter the Mushroom Order]; the Rules and Regulations (7 C.F.R. §§ 1209.200-.280) [hereinafter the Mushroom Regulations]; and the Rules of Practice Governing Proceedings on Petitions To Modify or To Be Exempted From Research, Promotion and Education Programs (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52) [hereinafter the Rules of Practice], by filing a Petition pursuant to 7 U.S.C. § 6106.

Petitioner alleges that the MPRCIA and assessments pursuant to the MPRCIA violate Petitioner's rights to

freedom of association and freedom of speech guaranteed under the First Amendment of the Constitution of the United States (Pet. ¶ 23). Petitioner seeks an exemption from assessments imposed in connection with the Mushroom Order and a refund of any past paid assessments under the Mushroom Order (Pet. ¶ 23).

On July 25, 1996, the Administrator of the Agricultural Marketing Service, United States Department of Agriculture [hereinafter Respondent], filed Answer of Respondent [hereinafter Answer] stating: (1) the Petition fails to state a claim upon which relief can be granted (Answer at 4); and (2) the MPRCIA, the Mushroom Order, and the Mushroom Regulations, as interpreted by Respondent and the Mushroom Council, are constitutional and otherwise fully in accordance with law (Answer at 4).

On November 15, 1996, Administrative Law Judge Edwin S. Bernstein [hereinafter ALJ] stayed the hearing in this proceeding pending action by the Supreme Court of the United States in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), *petition for cert. filed*, 65 U.S.L.W. 3052 (U.S. May 20, 1996) (No. 95-1879), and *Wileman Bros. & Elliott, Inc. v. Espy*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom. Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S. Ct. 1875 (1996), based on the ALJ's expectation that the Supreme Court of the United States would issue guidance in *Wileman Bros.* or *Cal-Almond*, or both *Wileman Bros.* and *Cal-Almond*, which might resolve the issue of Petitioner's First Amendment challenge in this proceeding (Summary of Teleconference—Stay Order, filed November 15, 1996).

On June 25, 1997, the Supreme Court of the United States entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), holding that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the Agricultural Marketing Agreement Act of 1937, as amended [hereinafter AMAA], neither abridge First Amendment rights nor implicate the First Amendment. Moreover, on June 27, 1997, the Supreme Court of the United States granted the petition for a writ of certiorari in *Cal-Almond*, vacated the judgment of the United States Court of Appeals for the Ninth Circuit, and remanded the case to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997). *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997). On September 4, 1997, the United States Court of Appeals for the Ninth Circuit remanded *Cal-Almond* "to the district court with instruction to dismiss Cal-Almond's First Amendment claim."

On October 21, 1997, Respondent, relying on, *inter alia*, *Wileman Bros.*, filed a motion to dismiss Petitioner's Petition (Respondent's Motion to Dismiss), and on November 14, 1997, Petitioner filed Petitioner's Opposition to Respondent's Motion to Dismiss. On December 9, 1997, the ALJ issued Decision and Order of Dismissal [hereinafter Initial Decision and Order] in which the ALJ concluded that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of the issues in this proceeding and dismissed the Petition with prejudice.

On January 14, 1998, Petitioner appealed to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35)[1]; on February 17, 1998, Respondent filed Respondent's Response to Petitioner's Appeal to the Judicial Officer; and on February 18, 1998, the case was referred to the Judicial Officer for decision.

Based upon a careful consideration of the record in this proceeding, I agree with the ALJ's conclusion that *Glickman v. Wileman Bros. & Elliott, Inc., supra,* is dispositive of the First Amendment issue in this proceeding and that Petitioner's Petition should be dismissed with prejudice. Therefore, I have adopted the ALJ's Initial Decision and Order as the final decision and order. Additions or changes to the Initial Decision and Order are shown by brackets, deletions are shown by dots, and minor editorial changes are not specified. Additional conclusions by the Judicial Officer follow the ALJ's Initial Decision and Order.

---

[1] The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g); section 4(a) of Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219, 3221 (1953), *reprinted in* 5 U.S.C. app. § 4(a) at 1491 (1994); and section 212(a)(1) of the Department of Agriculture Reorganization Act of 1994 (7 U.S.C. § 6912(a)(1)).

## II. APPLICABLE CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

[omitted]

## III. ALJ'S DECISION AND ORDER OF DISMISSAL (AS MODIFIED)

. . . .

Petitioner contends that [*Glickman v. Wileman Bros. & Elliott, Inc., supra,*] is distinguishable [from the facts in this proceeding] because the marketing orders at issue [in *Wileman Bros.*] regulate . . . aspects of the market [that are not regulated under] the MPRCIA. This distinction has twice been rejected by the United States District Court for the Eastern District of California, in cases involving California table grapes and California cut flowers. In *Delano Farms Co. v. California Table Grape Commission*, the court held that:

> [*Wileman's*] holding is summarized in the first words of the principal dissent: "The Court today finds no First Amendment right to be free of coerced subsidization of commercial speech . . . ." That principle controls. Plaintiff's argument [that] a different result obtains when a program does not regulate fruit size, color, etc. is unconvincing. Were that the case, the state could validate a program merely by adding additional regulatory burdens. Nothing in [*Wileman Bros.*] indicates results should differ in "stand alone" advertising programs.

*Delano Farms Co. v. California Table Grape Comm'n*, CV-F-96-6053 OWW DLB, slip op. at 6 (E.D. Cal. Sept. 11, 1997).

In *Matsui Nursery, Inc. v. California Cut Flower Commission*, the court, as stated during the hearing, held that:

> Plaintiff is mistaken in arguing that the California Cut Flower industry is to be distinguished from the more heavily regulated peach and nectarine production industry which the *Wileman* case considered. The *Wileman* decision did not turn on the degree to which State or Federal Government has otherwise displaced free market competition. Rather, the Court found that compelled participation in a generic advertising program is itself a form of economic regulation whose efficacy is to be judged by legislatures, Government officials and producers, and not by the Court under its free speech jurisdiction.

*Matsui Nursery, Inc. v. California Cut Flower Comm'n*, Civ No. S-96-102 EJG/GGH, slip op. at 12-13 (E.D. Cal. Aug. 4, 1997) (Reporter's Transcript).

Furthermore, in *In re Donald B. Mills*, Inc., 56 Agric. Dec. ___ (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997), the Judicial Officer held that *Wileman Bros.* did extend to the MPRCIA, and that it did preclude the petitioner's First Amendment claims with respect to mandatory assessments for generic advertising. *In re Donald B. Mills, Inc. supra*, slip op. at 4[3]-48.

Petitioner also argues that the Supreme Court of the United States, in *Wileman Bros.*, did not sufficiently address the freedom of association issue for the Court's decision to be binding on that issue. This argument was also rejected in *Delano Farms*, which held that:

> [*Wileman Bros.*] was decided on "First Amendment" grounds and addressed association under a federal marketing order. There is no distinction between speech and association in the "ideologically neutral" context of a generic advertising program.

*Delano Farms Co. v. California Table Grape Comm'n*, *supra*, slip op. at 11.

The Judicial Officer also held that neither freedom of association nor freedom of speech are infringed by the MPRCIA. He held:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's rights to freedom of association and speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

*In re Donald B. Mills, Inc.*, *supra*, slip op. at 48.

## IV. ADDITIONAL CONCLUSIONS BY THE JUDICIAL OFFICER

Petitioner raises four issues in Petitioner's Appeal to the Secretary [hereinafter Petitioner's Appeal Petition].

**A. Motion to Dismiss**

First, Petitioner contends:

> . . . [A]ll of the facts in the Complaint must be construed in the light most favorable to the Petitioner, consistent with Federal Rules of Civil Procedure Rule 12(c) or Rule 12(b)(6) with respect to motions to dismiss complaints. The dismissal occurred in this case without the benefit of a hearing. "[A] complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Petitioner's Appeal Petition at 3.

Petitioner's reliance on Rule 12(b)(6) and Rule 12(c) of the Federal Rules of Civil Procedure is misplaced. Rule 1 of the Federal Rules of Civil Procedure provides that the Federal Rules of Civil Procedure govern procedure in the United States district courts, as follows:

> **Rule 1. Scope and Purpose of Rules**
>
> These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or equity or in admiralty, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

Fed. R. Civ. P. 1.

The Federal Rules of Civil Procedure are not applicable to administrative proceedings which are conducted before the Secretary of Agriculture, under the MPRCIA, and in accordance with the Rules of Practice (7 C.F.R. §§ 900.52(c)(2)-.71, 1200.50-.52).[2]

---

[2] See generally, *Morrow v. Department of Agric.*, 65 F.3d 168 (Table) (per curiam) 1995 WL 523336 (6th Cir. 1995), *printed in* 54 Agric. Dec. 870 (1995) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *Mister Discount Stockbrokers, Inc. v. SEC*, 768 F.2d 875, 878 (7th Cir. 1985) (stating that neither the Federal Rules of Civil Procedure nor the Federal Rules of Criminal Procedure apply to administrative hearings); *In re Kreider Dairy Farms, Inc.*, 57 Agric. Dec. ___, slip op. at 12 (Feb. 20, 1998) (Order Denying Pet. for Recons.) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted before the Secretary of Agriculture, under the Agricultural Marketing Agreement Act of 1937, as amended, and in accordance with the Rules of Practice Governing Proceedings To Modify or To Be Exempted From Marketing Orders); *In re Dean Byard*, 56 Agric. Dec. ___, slip op. at 21 (Aug. 8, 1997) (stating that while respondent's reference to the "standard" Rules of Civil Procedure is unclear, no rules of civil procedure govern a proceeding instituted under the Horse Protection Act of 1970, as amended, and the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1045, 1055-56 (1996) (Clarification of Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re Far West Meats*, 55 Agric. Dec. 1033, 1039-40 (1996) (Ruling on Certified Questions) (stating that the Federal Rules of Civil Procedure are not applicable to Department proceedings conducted under the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes); *In re James Joseph Hickey, Jr.*, 53 Agric. Dec. 1087, 1096-99 (1994) (stating the Federal Rules of Civil Procedure

However, I agree with Petitioner's general point that, when considering a motion to dismiss filed in accordance with the Rules of Practice, allegations of material fact in a petition must be construed in the light most favorable to a petitioner.[3] However, even if the allegations of material fact in the Petition are construed in the light most favorable to Petitioner, I find that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), is dispositive of Petitioner's First Amendment claims and that the Petition fails to state a claim upon which relief can be granted. Therefore, I agree with the ALJ's Initial Decision and Order in which he granted Respondent's Motion to Dismiss and dismissed Petitioner's Petition with prejudice.

---

are not applicable to the Department's disciplinary proceedings conducted in accordance with the Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes), *aff'd*, 878 F.2d 385, 1989 WL 71462 (9th Cir. 1989) (not to be cited as precedent under 9th Circuit Rule 36-3), *printed in* 48 Agric. Dec. 107 (1989); *In re Shasta Livestock Auction Yard, Inc.*, 48 Agric. Dec. 491, 504 n.5 (1989) (holding the Federal Rules of Civil Procedure are not followed in proceedings before the Department of Agriculture).

[3] *In re Midway Farms, Inc.*, 56 Agric. Dec. 102, 113-14 (1997) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss filed pursuant to 7 C.F.R. § 900.52(c)); *In re Asakawa Farms, Inc.*, 50 Agric. Dec. 1144, 1149 (1991) (stating that allegations of material fact in a petition must be construed in the light most favorable to a petitioner claiming handler status when considering a motion to dismiss for want of standing filed pursuant to 7 C.F.R. § 900.52(c)), *dismissed*, No. CV-F-91-686-OWW (E.D. Cal. Sept. 28, 1993).

**B. First Amendment**

**1. Freedom of Speech**

Second, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), and *Department of Agric. v. Cal-Almond, Inc.*, 117 S. Ct. 2501 (1997), are not dispositive of Petitioner's First Amendment challenges to compelled assessments to fund the generic promotion program under the MPRCIA (Petitioner's Appeal Petition at 3-7).

The Supreme Court of the United States held in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with Marketing Order 916 (7 C.F.R. pt. 916) and Marketing Order 917 (7 C.F.R. pt. 917), both of which are issued under the AMAA, neither abridge First Amendment rights nor implicate the First Amendment.

As Petitioner correctly notes (Petitioner's Appeal Petition at 4), the Court in *Wileman Bros.* stressed the importance of the statutory context in which the First Amendment issue arises. However, the Court did not limit its holding to marketing orders issued under the AMAA. Instead, the Court held that three characteristics of the regulatory scheme at issue in *Wileman Bros.* distinguish it from laws that the Court found to abridge the freedom of speech protected by the First Amendment, as follows: (1) the marketing orders impose no restraint on the freedom of any producer to communicate any message to any audience; (2) the marketing orders do not compel any person to engage in any actual or symbolic speech; and (3) the marketing orders

do not compel producers to endorse or finance any political or ideological views.

An examination of the MPRCIA, the Mushroom Order, and the Mushroom Regulations reveals that the MPRCIA, the Mushroom Order, and the Mushroom Regulations have the very same three characteristics which the Court found dispositive of the First Amendment issue in *Glickman v. Wileman Bros. & Elliott, Inc., supra.*[4] First, Petitioner is not prohibited or restrained by the MPRCIA, the Mushroom Order, the Mushroom Regulations, or the Mushroom Council from promoting or advertising its brand of mushrooms or from communicating any other message to any audience. Section 501(b)(4)-(5) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that neither the MPRCIA, the Mushroom Order, nor the Mushroom Regulations prohibits or restricts any individual advertising or promotion or replaces the individual advertising or promotion efforts of producers or processors (110 Stat. 1030). This factor distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that restrictions on commercial speech violate the right to freedom of speech.[5]

---

[4] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 43-44 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

[5] *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495 (1996) (holding that a state statute which bans price advertising for alcoholic beverages abridges speech in violation of the First Amendment as made applicable to the states by the Fourteenth Amendment); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980) (holding that a New York Public Service Commission ban on advertising by an electric utility to

While the requirement that Petitioner fund generic advertising may reduce the amount of money available to Petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA, the Mushroom Order, and the Mushroom Regulations does not amount to a restriction on speech.[6]

---

promote the use of electricity violates the First and Fourteenth Amendments); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a state statute which bans the advertising of prescription drug prices violates the First and Fourteenth Amendments).

[6] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 45 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97- 5890 OWW SMS (E.D. Cal. Sept. 17, 1997) (stating that while the requirement that petitioner fund generic advertising may reduce the amount of money available to petitioner to conduct its own advertising or communicate other messages, this incidental effect of the MPRCIA and the Mushroom Order does not amount to a restriction on speech). *See also Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2138-39 (1997) (stating that the First Amendment has never been construed to require heightened scrutiny of any financial burden that has the incidental effect of constraining the size of a firm's advertising budget and the fact that an economic regulation may indirectly lead to a reduction in an individual advertising budget does not itself amount to a restriction on speech); *In re Cal-Almond, Inc.*, 56 Agric. Dec. ___, slip op. at 86-87 (Dec. 24, 1997) (stating that while the requirement that petitioners fund generic advertising may reduce the amount of money available to petitioners to conduct their own advertising or communicate other messages, this incidental effect of the AMAA and the Almond Order does not amount to a restriction on speech); *In re Jerry Goetz*, 56 Agric. Dec. ___, slip op. at 33 (Nov. 3, 1997) (stating that even if the requirements of the Beef Promotion and Research Act of 1985 (7 U.S.C. §§ 2901-2911), the Beef Promotion and Research Order (7 C.F.R. §§ 1260.101-.217), and the Rules and Regulations (7 C.F.R. §§ 1260.301-.316) did reduce resources available to respondent to engage in his own speech, this incidental effect would not amount to a restriction on speech).

Second, Petitioner is not compelled to speak by either the MPRCIA, the Mushroom Order, or the Mushroom Regulations. This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that compelled speech violates the right to freedom of speech or association.[7] While Petitioner is compelled under the MPRCIA, the Mushroom Order, and the Mushroom Regulations to fund promotion of mushrooms, this requirement is not a requirement that Petitioner speak. Petitioner is not publicly identified or publicly associated with the Mushroom Council's promotion program, and Petitioner is not required to respond to the Mushroom Council's promotion program.[8]

---

[7] *See Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995) (holding that requiring private citizens who organize a parade to include a group which imparts a message that organizers do not wish to convey violates the First Amendment); *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988) (holding that a state statute requiring professional fund raisers to disclose to potential donors the percentage of charitable contributions collected that were turned over to the charity mandates speech in violation of the First Amendment); *Wooley v. Maynard*, 430 U.S. 705 (1977) (holding that a state statute requiring an individual to display an ideological message on his or her private property violates the First Amendment); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (holding that action of a state making it compulsory for children in public schools to salute the flag and pledge allegiance to the flag and the republic for which the flag stands violates the First and Fourteenth Amendments).

[8] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 46 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97- 5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

Finally, on the issue of freedom of speech, the Mushroom Council's mushroom promotion program has no political or ideological content, and Petitioner is not compelled by the MPRCIA, the Mushroom Order, or the Mushroom Regulations to endorse or finance any political or ideological views. Section 501(b)(8)(B) of the Federal Agriculture Improvement and Reform Act of 1996 specifically provides that the MPRCIA establishes a program to produce "nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding . . . markets . . ." (110 Stat. 1031). This fact distinguishes the MPRCIA, the Mushroom Order, and the Mushroom Regulations from cases in which the Supreme Court has found that required financing of political or ideological speech violates the right to freedom of speech.[9]

I find that *Glickman v. Wileman Bros. & Elliott, Inc., supra*, is dispositive of the First Amendment issue in this proceeding. The differences between the regulatory scheme in the marketing orders at issue in *Wileman Bros.* and the regulatory scheme at issue in this

---

[9] *See Keller v. State Bar of California*, 496 U.S. 1 (1990) (holding that a state bar's use of compulsory dues paid by attorneys to finance political or ideological activities with which the attorneys disagree violates the attorneys' First Amendment right of free speech when such expenditures are not necessarily or reasonably incurred for the purpose of regulating the legal profession or improving the quality of legal services); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977) (holding that a union's use of compulsory service charges paid by public school teachers to finance ideological causes with which the teachers disagree violates the teachers' First Amendment right to freedom of speech when such expenditures are not germane to the union's duties as a collective bargaining representative).

proceeding are not relevant to Petitioner's First Amendment challenge to the MPRCIA and the assessments imposed pursuant to the MPRCIA. Thus, the requirement under the MPRCIA, the Mushroom Order, and the Mushroom Regulations that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right to freedom of speech under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA, the Mushroom Order, or the Mushroom Regulations.[10]

**2. Freedom of Association**

Third, Petitioner contends that *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130 (1997), does not dispose of Petitioner's claim that the MPRCIA and the assessments imposed pursuant to the MPRCIA violate Petitioner's right to freedom of association guaranteed under the First Amendment of the Constitution of the United States (Petitioner's Appeal Petition at 7-11).

I disagree with Petitioner. The Court in *Wileman Bros.* addresses freedom of association stating that, in contrast to compelled contributions for collective bargaining where an employee may have ideological, moral, or religious objections to the union's activities, "the collective programs authorized by the marketing order do not, as a general matter, impinge on speech or association rights." *Glickman v. Wileman Bros. & Elliott, Inc., supra*, 117 S. Ct. at 2140 n.16. The United

---

[10] *In re Donald B. Mills, Inc.*, 56 Agric. Dec. ___, slip op. at 48 (Aug. 27, 1997), *appeal docketed*, No. CIV F-97-5890 OWW SMS (E.D. Cal. Sept. 17, 1997).

States District Court for the Eastern District of California, examining the constitutionality of a law permitting the California Table Grape Commission to assess shipped grapes to fund generic advertising of California table grapes, states "[t]he predicate of [*Wileman Bros.*] is that there is no First Amendment right of association *not* to be compelled to associate for generic advertising" and that "no compelling purpose is needed . . . to require commercial association." *Delano Farms Co. v. California Table Grape Comm'n*, *supra*, slip op. at 11 (emphasis in original).

Moreover, I have previously held, based on *Wileman Bros.*, that freedom of association is not infringed by compelled funding of the generic promotion program under the MPRCIA and the Mushroom Order, as follows:

> [T]he requirement under the MPRCIA and the Mushroom Order that Petitioner fund the promotion of fresh mushrooms does not violate Petitioner's right [] to freedom of association . . . under the First Amendment to the Constitution of the United States, and Petitioner's rights under the First Amendment are not even implicated by the MPRCIA or the Mushroom Order.

*In re Donald B. Mills, Inc.*, *supra*, slip op. at 48.

**C. Amendment of Petition**

Fourth, Petitioner contends that the ALJ erred by not allowing Petitioner to amend its Petition, as follows:

> . . . In Petitioner's Opposition to the Respondent's Motion to Dismiss, at page 11 of that document, United Foods alleged that when it filed its Com-

> plaint, it was consistent with the *Ninth Circuit* decisions in *Wileman* and *Cal-Almond.* It was claimed that the U.S. Supreme Court had announced a new "test". Petitioners [sic] sought in that brief to be allowed to amend its Petition to allege factual allegations in light of the Supreme Court *Wileman* case. The ALJ never addressed the issue. Therefore, the ALJ's decision should be reversed, and United Foods should be given the opportunity to amend its Complaint in light of the *Wileman* decision. There would be no prejudice to the Respondent.

Petitioner's Appeal Petition at 11 (emphasis in original).

Petitioner states in Petitioner's Opposition to Respondent's Motion to Dismiss, filed November 14, 1997, that Petitioner should be entitled to amend its Petition, as follows:

> When Petitioner filed this complaint, it filed it consistent with the Ninth Circuit decisions in *Wileman* and *Cal-Almond.* The U.S. Supreme Court has now announced a new "test". Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman.* The rules of practice allow amending petitions. There would be no prejudice to the Respondent.

Petitioner's Opposition to Respondent's Motion to Dismiss at 11.

Section 900.52b of the Rules of Practice (7 C.F.R. § 900.52b) provides for the amendment of pleadings, as follows:

> **§ 900.52b Amended pleadings.**
>
> At any time before the close of the hearing the petition or answer may be amended, but the hearing shall, at the request of the adverse party, be adjourned or recessed for such reasonable time as the judge may determine to be necessary to protect the interests of the parties. Amendments subsequent to the first amendment or subsequent to the filing of an answer may be made only with leave of the judge or with the written consent of the adverse party.

7 C.F.R. § 900.52b.

Further, section 900.59(a)(2) provides that the judge is authorized to rule on all motions and requests, as follows:

> **§ 900.59 Motions and requests.**
>
> (a) *General.* . . .
>
> (2) The judge is authorized to rule upon all motions and requests filed or made prior to the transmittal by the hearing clerk to the Secretary of the record as provided in this subpart. . . .

7 C.F.R. § 900.59(a)(2).

However, Petitioner's statement (that "Petitioner should be entitled to amend its petition to allege factual allegations in light of *Wileman*") in Petitioner's Opposi-

tion to Respondent's Motion to Dismiss is in the form of a statement, rather than an application or request for a ruling, and I do not find that Petitioner's statement is a motion.[11] While the formalities of court practice do not

---

[11] Black's Law Dictionary 1013 (6th ed. 1990) defines the word *motion* as follows:

> **Motion.** . . .
>
> An application made to a court or judge for purpose of obtaining a rule or order directing some act to be done in favor of the applicant. . . .

See generally *United States v. Brick*, 905 F.2d 1092, 1098-99 (7th Cir. 1990) (concluding that statements made by the government to the court, including the statement that defendant's cooperation should be considered, do not satisfy the motion requirement under section 5K1.1 of the Sentencing Guidelines); *United States v. Coleman*, 895 F.2d 501, 505 (8th Cir. 1990) (stating that letters from the government informing the court of defendant's cooperation, although the functional equivalent of a motion, do not satisfy the motion requirement of 18 U.S.C. § 3553(e)); *St. Paul Fire & Marine Ins. Co. v. Continental Casualty Co.*, 684 F.2d 691, 693 (10th Cir. 1982) (stating that St. Paul's "Objections to Proposed Order" is technically not a motion because it is in the form of a statement rather than an application or request for an order and does not set forth the relief or order sought); *In re Marriage of Houtchens*, 592 P.2d 158, 161 (Mont. 1979) (stating that in construing the civil rule on form motions, this court has frequently stated that a motion is an application for an order); *State ex rel. Gage v. District Court of the Second Judicial District*, 419 P.2d 746, 748 (Mont. 1966) (stating that a motion is an application for an order); *State v. Wise*, 419 P.2d 342, 344 (Ariz. 1966) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and it should call to the attention of the court the particular purpose sought to be achieved, so that the court be given an opportunity to rule on the matter); *Williams v. Denning*, 133 S.E.2d 150, 151 (N.C. 1963) (per curiam) (stating that, under G.S. § 1-578, a motion is an application for an order); *State v. James*, 347 S.W.2d 211, 216 (Mo. 1961) (stating that a motion is an application made to a court or judge for the purpose

of obtaining a ruling or order directing some act be done in favor of the applicant); *McClinton v. Rice*, 265 P.2d 425, 428 (Ariz. 1953) (stating that the purpose of a motion is to obtain a ruling or an order directing that some act be done in favor of the applicant, and the essentials of a motion are that the attention of the court must be called to the particular matter or request, and that the court be given an opportunity to rule as to the matter); *State ex rel. McVay v. District Court of Fourth Judicial District*, 251 P.2d 840, 845 (Mont. 1952) (stating that, under R.C.M. 1947, s 93-8401, a motion is an application for an order); *Iveson v. Second Judicial District Court*, 206 P.2d 755, 759 (Nev. 1949) (stating that a motion is a proceeding directed to a court's authority to act on a given subject; a motion is an application for an order); *People v. Hornaday*, 81 N.E.2d 168, 170 (Ill. 1948) (stating that a motion is an application to the court); *Paramount Publix Corp. v. Boucher*, 19 P.2d 223, 225 (Mont. 1933) (stating that a motion is merely "an application for an order" (section 9772, Rev. Codes 1921)); *Brown v. Caldwell*, 16 P.2d 139, 141 (Cal. 1932) (concluding that a statement of respondent's counsel that he intended to ask for an instructed verdict was not a motion for an instructed verdict; a motion is an application for an order (section 1003, Code of Civil Procedure), and counsel's statement of what he intended to do was not an application for an order); *People v. Brickey*, 178 N.E. 483, 484 (Ill. 1931) (stating that a motion is an application to the court); *Harris v. Chicago House-Wrecking Co.*, 145 N.E. 666, 669 (Ill. 1924) (stating that a motion is an application made to a court for a rule or order); *Genardini v. Kline*, 190 P. 568, 570 (Ariz. 1920) (stating that a motion is an application made to a judge or the court for the purpose of obtaining a rule or order directing some act to be done in favor of the applicant); *State v. Warner Valley Stock Co.*, 137 P. 746, 747 (Or. 1914) (stating that in legal proceedings a motion is an application by a party to an action or suit for some kind of relief, that a motion should state what relief the mover desires and the reasons or grounds for asking for the relief, and that it is the duty of the party who asks for relief by motion to point out specifically what he desires); *Hammer v. Campbell Automatic Safety Gas Burner Co.*, 144 P. 396, 398 (Or. 1914) (stating that a motion is an application to the court for relief of some kind and it should state what relief is desired, and usually, it should state the grounds for asking for the

apply to motions filed in administrative proceedings, parties in administrative proceedings have an obligation to identify and frame applications or requests for rulings so that they are recognizable as such by administrative law judges. Petitioner's statement in Petitioner's Opposition to Respondent's Motion to Dismiss is neither identified nor framed as an application for a ruling. I do not find that the ALJ erred by failing to exercise his authority under section 900.59(a)(2) of the Rules of Practice (7 C.F.R. § 900.59(a)(2)) to rule on Petitioner's putative motion for leave to amend its Petition, which putative motion is in the form of a statement rather than an application or request for a ruling.

---

relief demanded); *Taylor v. Woodbury*, 120 P. 367 (Kan. 1912) (stating that under Kansas civil code a motion is defined as an application for an order addressed to the court or a judge in vacation); *Brownell v. Superior Court of Yolo County*, 109 P. 91, 94 (Cal. 1910) (stating that a motion is an application for an order); *Arnold v. Regan*, 69 A. 292 (R.I. 1908) (per curiam) (stating that a motion is a request to the court to grant the mover some right to which he claims); *Williams v. Hawley*, 77 P. 762, 763 (Cal. 1904) (stating that a motion is an application for an order); *Reid v. Fillmore*, 73 P. 849, 850 (Wyo. 1903) (stating, by our Code of Civil Procedure, a motion is defined to be "an application for an order addressed to a court or judge by a party to a suit or proceeding, or one interested therein"); *McGuire v. Drew*, 23 P. 312, 314 (Cal. 1890) (stating that, under section 1003 of the Code of Civil Procedure, an application for an order is a motion).

For the foregoing reasons, the following Order should be issued.

**V. Order**

The relief requested by Petitioner is denied and the Petition is dismissed with prejudice.

Done at Washington, D.C.

March 4, 1998

/s/ WILLIAM G. JENSON
WILLIAM G. JENSON
Judicial Officer

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

---

Civil Action No. 1-96-1252

UNITED STATES OF AMERICA, PLAINTIFF

*v.*

UNITED FOODS, INC., DEFENDANT

---

**COMPLAINT**

The United States of America brings this civil action under the provision of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended (hereinafter referred to as "the Act"), 7 U.S.C. 6107(a), vesting the several District Courts of the United States with jurisdiction specifically to enforce, and to prevent and restrain any person from violating, any order or regulation issued by the Secretary of Agriculture under the authority contained in the Act, and alleges as follows:

1. Jurisdiction is conferred on this Court by 7 U.S.C. 6107(a)

2. Venue lies in this Court pursuant to 28 U.S.C. § 1391 (b) and (c), inasmuch as the defendant resides and has its offices and principal place of business in this judicial district.

3. The plaintiff is the United States of America, initiating this action as authorized under 7 U.S.C. 6107.

4. The defendant United Foods, Inc., is a corporation organized and existing under the laws of the State of Delaware, and doing business as Pictsweet Mushroom Farms. Its offices and principal place of business are located at 10 Pictsweet Drive, Bells, Tennessee 38006-0119, within the Western District of Tennessee.

5. This action is brought to enforce the provisions of the Act and the Mushroom Promotion, Research, and Consumer Information Order (hereinafter "the Order"), 7 C.F.R. 1209.1-1209.77, and the regulations thereunder, 7 C.F.R. 1209.200-1209.280, issued pursuant to the provisions of the Act.

6. The Order and regulations are administered by the Mushroom Council, which is composed of mushroom producers and importers appointed by the Secretary of Agriculture, and whose function is to conduct the day to day operations set forth in the Act, Order and regulations. 7 U.S.C. 6102(3), 6104(b) and 7 C.F.R. 1209.4, 1209.30-.35 (establishing the Mushroom Council); 7 U.S.C. 6104(c)-(f), 7 C.F.R. 1209.38-.50 (powers and duties of the Mushroom Council).

7. As part of its duties, the Mushroom Council develops, recommends to the Secretary of Agriculture for approval, and administers projects for mushroom promotion, research, consumer information and industry information. 7 U.S.C. 6104(c)(4), 6101 (b); 7 C.F.R. 1209.38 (a), (b), (c), (j), 1209.39 (b), (1), 1209.40.

8. Funds for both these projects and the administrative expenses of the Mushroom Council are generated by levying assessments on producers and importers of mushrooms based on the poundage of mushrooms marketed for fresh use in the United States. 7 U.S.C. 6101(b), 6104(g)(1), (3) and 7 C.F.R. 1209.50(b), 1209.51. First handlers of domestically produced mushrooms are required to collect and remit the assessments levied on their producers and levied on their own production. 7 U.S.C. 6102 (5), 6104 (g) (1), (3); 7 C.F.R. 1209.51(a), (c), 1209.251 (a), (b) .

9. Pursuant to 7 U.S.C. 6104 and 7 C.F.R. 1209.50(a) (1), the Mushroom Council annually recommends to the Secretary of Agriculture a budget for its projects and administrative expenses and a proposed rate of assessment to fund that budget.

10. After approval by the Secretary of Agriculture, and in accord with the limits in 7 U.S.C. 6104(g)(2), an assessment rate of $.0045 per pound was duly adopted for mushrooms produced or imported after February 1, 1996.

11. Pursuant to the Act, Order, and regulations, first handlers, including marketing producers, are also required to file monthly reports detailing, *inter alia*, the number of pounds of assessable mushrooms and the amount of assessments remitted. 7 U.S.C. 6104(i)(1); 7 C.F.R. 1209.60, 1209.260.

12. At least since the inception of reporting and assessment collection under the Act and Order on August 1, 1993, defendant United Foods, Inc., doing business as Pictsweet Mushroom Farms, has been and

is a producer and first handler of mushrooms subject to assessments and monthly reporting under the Act, Order and regulations.

13. Defendant United Foods, Inc., has not filed monthly reports or remitted assessments due for May and June 1996, and has advised the Mushroom Council that it does not intend to file any further reports or remit assessments. Based on the average of its unaudited first handler reports for the previous twelve months, it is estimated that the amount of assessments due is at least $8,000 per month, exclusive of interest.

14. Defendant United Foods, Inc., is violating the Act, Order, and regulations by failing and refusing to file first handler reports and pay assessments when due and will continue to do so until appropriate relief is granted pursuant to 7 U.S.C. 6107(a).

15. Defendant's failure to file first handler reports and pay its assessments has caused and will cause injury and irreparable harm to the operation of the Order and is detrimental to the public interest. Defendant's violations of the Act and the Order threaten the entire scheme of the Order, by causing unfairness to those producers and first handlers who are in compliance with the order and by encouraging wider noncompliance with that Order.

WHEREFORE, the United States respectfully requests that this Court:

1. Issue both temporary and permanent mandatory injunctions commanding the defendant, its officers, agents, employees, successors, assigns and all other

persons in concert or participation with it to comply fully with the Act and all provisions of the Order and the regulations thereunder, now in effect and as they subsequently may be amended, and particularly to:

(a) File forthwith with the Mushroom Council all first handler reports now due;

(b) Pay forthwith to the Mushroom Council all assessment obligations now due, including late payment charges and interest thereon pursuant to 7 C.F.R. 1209.51(g) and 1209.251 (e), (f); and

(c) File with the Mushroom Council all future first handler reports and pay to the Mushroom Council all future assessment obligations when due, including those which accrue during the pendency of this action, pursuant to the provisions of the Act, the Order, and the regulations issued thereunder.

2. Issue both temporary and permanent mandatory injunctions preventing and restraining the defendant, its officers, agents, employees, successors, assigns and all other persons in concert or participation with it from violating the Act and all provisions of the Order and the regulations thereunder now in effect and as they subsequently may be amended.

3. Retain jurisdiction of this action for the purposes of entering such other, further and different orders and judgments as may be necessary in order to give full relief herein.

4. Grant plaintiff its cost of this action.

Respectfully submitted,

VERONICA F. COLEMAN
United States Attorney

/s/ BRIAN J. QUARLES
BRIAN J. QUARLES
Assistant United States Attorney
Suite 800, 167 North Main Street
Memphis, Tennessee 38103-1898
(901) 544-4231
(Tennessee BPR# 17142)

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

---

CIVIL ACTION NO. 1-98-1082

UNITED FOODS, INC., PLAINTIFF

*v.*

UNITED STATES OF AMERICA, THE UNITED STATES DEPARTMENT OF AGRICULTURE, DEFENDANT

---

[Filed: Mar 23, 1998]

---

**COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR DECLARATORY RELIEF**

United Foods, Inc. ("United Foods"), for its Complaint against the United States of America, The United States Department of Agriculture (the "U.S.D.A."), states as follows:

**PARTIES**

1. United Foods is a corporation organized and existing under the laws of the State of Delaware. Since 1987, United Foods has been and is a producer and first handler of mushrooms doing business as Pictsweet Mushroom Farms. United Foods' offices and principal place of business are located in Bells, Tennessee, within the Western District of Tennessee.

2. The U.S.D.A. is the agency in charge of the Mushroom Promotion, Research and Consumer Information Act of 1990, as amended, 7 U.S.C. §§ 6101-6112 (hereinafter the "Mushroom Law").

**NATURE OF THIS ACTION**

3. On June 25, 1996, United Foods filed with the U.S.D.A. a petition under the Mushroom Law, pursuant to 7 U.S.C. § 6106(a), alleging that the Mushroom Law and assessments pursuant to the Mushroom Law violate United Foods' rights to freedom of speech and freedom of association guaranteed under the First Amendment of the Constitution of the United States and United Foods' right to equal protection under the Fifth Amendment to the Constitution.

4. On March 4, 1998, the U.S.D.A. entered a Decision and Order denying the relief requested by United Foods and dismissing United Foods' petition.

5. United Foods is bringing this action pursuant to 7 U.S.C. § 6106(b). In this action, United Foods is challenging and is requesting this Court to review the Decision and Order by the U.S.D.A.

**JURISDICTION AND VENUE**

6. This Court has jurisdiction pursuant to 7 U.S.C. § 6106(b) of the Mushroom Law, which authorizes the District Court to review any decision by the Secretary of the U.S.D.A. following the Secretary's decision on a petition filed pursuant to 7 U.S.C. § 6106(a). This Court also has jurisdiction pursuant to 5 U.S.C. §§ 702 through 706 which provides jurisdiction to the District Courts to review agency actions.

7. This Court also has jurisdiction pursuant to 28 U.S. C. §§ 2201 and 2202 in order to declare the rights and obligations of United Foods and the U.S.D.A. in administrative proceedings brought pursuant to 7 U.S.C. § 6106.

8. Venue is appropriate in this District because United Foods does business within this District. 7 U.S.C. § 6106(b)(1).

**FACTUAL BACKGROUND**

9. United Foods began approximately fifty years ago processing and selling frozen foods. United Foods processes, markets and distributes a full line of frozen vegetables.

10. Pictsweet Mushroom Farms, a division of United Foods, began in 1987 to engage in the business of producing fresh mushrooms. Pictsweet Mushroom Farms is structured as three separate business units, with a mushroom farm in Ventura, California, one in Salem, Oregon, and one in Fillmore, Utah.

11. Through its Pictsweet division, United Foods grows, markets and distributes more than 500,000 pounds of fresh mushrooms per year. United Foods sells mushrooms in the retail, wholesale and food service channels of trade.

12. Growing, marketing and distributing fresh mushrooms is a service-oriented business.

13. Fresh mushrooms are not sold in a geographic market that is nationwide in scope. Because fresh

mushrooms have a short shelf life and are light weight, fresh mushrooms cannot be efficiently transported long distances. Consequently, fresh mushroom producers such as United Foods must sell their mushrooms within relatively small geographic regions surrounding the mushroom farms where the mushrooms are produced. In these respects, fresh mushrooms are unique as compared to most other agricultural products.

14. Because of the nature of the fresh mushroom industry and the location of United Foods' mushroom farms, United Foods sells its mushrooms in three separate regional markets: (i) Southern California and Arizona; (i) [sic] the Pacific Northwest; and (iii) the Central Rocky Mountain States.

15. The regional markets for fresh mushrooms are self-contained. The supply of fresh mushrooms in a regional market, and the market prices for those mushrooms, are determined primarily by factors that exist within that regional market. Supply and market prices for fresh mushrooms within a regional market are less affected by producers or other factors that exist outside that regional market.

16. Within each regional market for fresh mushrooms, market prices are sensitive to the quantity of fresh mushrooms that are produced in that market. In turn, as prices increase, the quantity of fresh mushrooms that are produced in that market will increase, such that prices will stabilize through the operation of natural market forces. Producers in most regional markets have the capacity to increase or decrease production within a relatively short period of time,

approximately three (3) months, to respond to changes in market price.

17. Fresh mushrooms are not a homogenous product: there are different varieties of fresh mushrooms; different producers offer different kinds and levels of service in connection with the marketing of their fresh mushrooms; different producers use different kinds and styles of packaging for their fresh mushrooms; and the quality of fresh mushrooms sold by different producers is different.

18. The primary customers of United Foods and other producers of fresh mushrooms are retail grocery outlets. In the regional markets where United Foods sells its fresh mushrooms, the retail grocery industry has been rapidly consolidating into a smaller number of larger grocery chains; and, therefore, the total number of United Foods' customers within its fresh mushroom markets has become smaller.

19. United Foods, like other fresh mushroom producers, engages in independent marketing activities, at its own expense, that are geared towards the regional markets in which it sells its product. Because of the regional nature of the industry, fresh mushroom producers do not independently engage in nationwide marketing activities.

20. To be successful, marketing efforts by United Foods or other fresh mushroom producers must accomplish at least two objectives. First, the fresh mushroom producer must establish favorable relationships with the grocery stores in the region, and together the fresh mushroom producer and the grocery store must de-

velop customized marketing programs that are geared to the customer demands in the region and the unique qualities of the fresh mushrooms sold by the producer. Second, the fresh mushroom producer must advertise the distinguishing characteristics of the fresh mushrooms which it produces.

21. In 1990 Congress enacted the Mushroom Law, 7 U.S.C. §§ 6101-6112. Pursuant to the Mushroom Law, the U.S.D.A. promulgated the Mushroom Promotion, Research, and Consumer Information Order at 7 C.F.R. §§ 1209.200-.280 (hereinafter, the "Mushroom Order").

22. The Mushroom Order provides for the formation of a Mushroom Council, which is a committee of competitors of United Foods appointed by the Secretary of Agriculture. The Mushroom Council exists to develop industry-wide (*i.e.* nationwide) promotion, research and consumer information programs for mushrooms, ostensibly to stimulate the demand for fresh mushrooms. *See* 7 U.S.C. § 6104(c)(4), 6101(b); 7 C.F.R. § 1209.38(a), (b), (c), (j), (1), 1209.40. These are "generic" promotional programs in that they do not recognize the distinguishing characteristics of the different mushrooms and related services offered by the different mushroom producers. These programs also fail to recognize that mushroom markets are regional in nature, and that the effectiveness of different kinds of marketing and promotional techniques will depend upon the types and quality of the mushrooms and services being offered and the regions in which the mushrooms and services are being sold.

23. Funds for the generic promotional and advertising programs developed by the Mushroom Council are

generated by levying assessments on larger mushroom producers and importers of mushrooms, based upon the poundage of mushrooms marketed for fresh use in the United States. 7 U.S.C. § 6101(b), 6104(g)(1), (3); 7 C.F.R. § 1209.50(b), 1209.51. Because United Foods produces and sells more than 500,000 pounds of fresh mushrooms per year, United Foods is subject to the assessments of the Mushroom Council.

24. The Mushroom Law contains "free-rider" provisions which exempt certain groups of mushroom producers from assessments for financing the Mushroom Council programs. These provisions permit the exempt mushroom producers to "free-ride" on the purported benefits of the promotional and advertising programs. For example, by definition, the Mushroom Law excludes assessments for the mushroom producer who sells less than 500,000 pounds of fresh mushrooms per year in the domestic market, 7 U.S.C. § 6102(11), or for producers who sell their product in the processed forms, including marinated, canned, frozen, cooked, blanched, dried, or "otherwise processed" forms. 7 U.S.C. § 6102(9). The Mushroom Law also exempts from assessments mushrooms produced in the United States that are sold in the export market. 7 U.S.C. § 6104(g)(4).

25. The generic promotional and advertising programs developed by the Mushroom Council have had no discernable effect on the different fresh mushroom markets in the United States or on consumer demand for fresh mushrooms. There are several reasons for this. Among other things: the funds generated through assessments are inadequate to promote fresh mushrooms on a nation-wide scale; nation-wide advertising

and promotional program will be incapable of materially influencing consumer demand in the various unique regional markets that exist for fresh mushrooms; the Mushroom Council programs cannot assist producers like United Foods in providing better quality of product or service to customers, which is necessary to any successful marketing program; the Mushroom Council programs are incapable of distinguishing the fresh mushrooms and services offered by the different producers, which is also essential to any successful marketing program; and the Mushroom Council programs, by definition, cannot regulate the regional markets for fresh mushrooms.

26. United Foods is opposed to the general content of the Mushroom Council's programs. The Mushroom Council's programs portray fresh mushrooms as a homogenous product, which is not true. By portraying fresh mushrooms in this manner, the Mushroom Council delivers a message to the general public which is contrary to the message United Foods attempts to deliver to its customers in its regional markets. United Foods, in its marketing programs, attempts to portray its fresh mushroom products as unique, which they are. The content of the Mushroom Council's programs, therefore, runs contrary to the interests of United Foods.

27. United Foods has also objected to the specific content of certain of the Mushroom Council's programs. For example, United Foods objected to the Mushroom Council's portrayal of mushrooms as an aphrodisiac, which United Foods felt was inaccurate and inappropriate.

28. The Mushroom Law deals only with the advertising and promotion of mushrooms. The Mushroom Law does not purport to regulate the mushroom industry. For example, the Mushroom Law does not regulate price, size, pack, maturity, production levels, quotas, reserves, or any other matters that are designed to restrict competition and/or stabilize markets or prices. Rather, the Mushroom Law exists only for the purpose of compelling certain mushroom producers and handlers to fund advertising and promotional activities of the Mushroom Council.

29. The Mushroom Law does not serve a legitimate governmental interest.

30. The Mushroom Law and the Mushroom Order violate United Foods' right to freedom of speech under the First Amendment of the United States Constitution, in that the Mushroom Order wrongfully compels United Foods to fund the speech of the Mushroom Council. This speech is objectionable to United Foods, this speech is contrary to the interests of United Foods, and this speech neither serves nor is ancillary to any legitimate economic or other governmental purpose.

31. The Mushroom Law and the Mushroom Order violate United Foods' right to freedom of association under the First Amendment of the United States Constitution, in that the Mushroom Order wrongfully compels United Foods to associate with the Mushroom Council and the other mushroom producers represented by the Mushroom Council.

32. The Mushroom Law and the Mushroom Order violate United Foods' right to equal protection under

the Fifth Amendment of the United States Constitution, in that certain mushroom producers are exempted from assessments to fund the advertising and promotional activities of the Mushroom Council, and there is no rational basis for the discriminatory treatment of the different classes of mushroom producers provided for under the Mushroom Law.

**PROCEDURAL AND LEGAL BACKGROUND**

33. On June 25, 1996, United Foods filed with the U.S.D.A. its administrative petition (MPRCIA Docket No. 96-001) challenging the constitutionality of the Mushroom Law and the Mushroom Order.

34. On November 15, 1996, the Administrative Law Judge who was assigned to the case stayed the administrative proceeding because of the pending action by the United States Supreme Court in *Cal-Almond, Inc. v. Department of Agric.*, 14 F.3d 429 (9th Cir. 1993), 67 F.3d 874 (9th Cir. 1995), and *Wileman Bros. & Elliott, Inc. v. Espy. Inc.*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted sub nom., Glickman v. Wileman Bros. & Elliott, Inc.*, 116 S.Ct. 1875 (1996).

35. On June 25, 1997, the Supreme Court entered its decision in *Glickman v. Wileman Bros. & Elliott, Inc.*, 117 S.Ct. 2130 (1997), *reh'd denied*, 118 S.Ct. 25 (1997). The Supreme Court, in a 5 to 4 opinion, reversed the Ninth Circuit and held that compelled funding of generic advertising of California nectarines, plums, and peaches in accordance with certain Marketing Orders issued under the Agricultural Marketing Agreement Act of 1937 (the AMAA) was not unconstitutional.

36. On December 9, 1997, the Administrative Law Judge in United Foods' administrative proceeding issued a Decision and Order of Dismissal which concluded that *Wileman Bros., supra,* was dispositive of the issues raised by United Foods in that proceeding.

37. On January 14, 1998, United Foods appealed the Administrative Law Judge's decision to the Judicial Officer to whom the Secretary of Agriculture has delegated authority to act as final deciding officer in the Department's adjudicatory proceedings subject to 5 U.S.C. §§ 556 and 557 (7 C.F.R. § 2.35).

38. On March 4, 1998, the Judicial Officer issued a Decision and Order affirming the decision of the Administrative Law Judge. It is this Decision and Order which United Foods is hereby challenging and asking this Court to review.

39. Contrary to the ruling by the Judicial Officer in the U.S.D.A. administrative proceeding, *Wileman Bros., supra,* is not dispositive of the constitutional claims asserted by United Foods, for the following reasons:

(1) The First Amendment issue in *Wileman Bros.* arose in the context of a detailed regulatory scheme that restricts competition among California nectarine and peach growers in order to maintain stable marketing conditions for those agricultural products. 117 S.Ct. at 2134-35. The Court in *Wileman Bros.* held, essentially, that generic advertising provisions that are ancillary to a broad and detailed marketing scheme designed to stabilize markets are not subject to traditional First

Amendment analysis. The Court noted that the regulatory scheme in *Wileman Bros.* has many collectivist goals unrelated to advertising, and generic advertising in the context of that regulatory scheme is constitutionally justified because it serves the collectivist goals of the regulatory scheme.

(2) The First Amendment issues in United Foods' case, on the other hand, do not arise in the context of such a regulatory scheme. The Mushroom Law is free standing legislation with no regulatory intent except to collect assessments for promotion, advertising, and research. The Mushroom Law does not purport to restrict competition or to regulate the mushroom market. The Supreme Court in *Wileman Bros.* did not address the constitutionality of the kinds of compelled advertising and promotional activities that are at issue in United Foods' case.

(3) This distinction is central to the holding in *Wileman Bros.* The Supreme Court majority in *Wileman* Bros. made clear that its decision must be understood in the context of the statutory scheme in which the First Amendment issue arose in that case. The majority opinion said:

> The legal question that we address is whether being compelled to fund this advertising raises a First Amendment issue for us to resolve, or rather is simply a question of economic policy for Congress and the Executive to resolve.
>
> **In answering that question we stress the importance of the statutory context in which it arises.** California nectarines and peaches are

> marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. **The business entities that are compelled to fund the generic advertising at issue in this litigation do so as part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities, under the standard appropriate for the review of economic regulation or under a heightened standard appropriate for the review of First Amendment issues.**

117 S. Ct. at 2138 (emphasis added). Later in the decision the Court said:

> Generic advertising is intended to stimulate consumer demand for an agricultural product **in a regulated market**. That purpose is legitimate and consistent with the regulatory goals of the overall statutory scheme.

*Id.* at 2141 (emphasis added). And towards the end of its opinion, the majority said:

> In sum, what we are reviewing is a species of economic regulation that should enjoy the same strong presumption of validity that we accord to other policy judgments.

*Id.* at 2142.

(4) The regulatory scheme at issue in *Wileman Bros.* was a "marketing order" promulgated under the Agricultural Marketing Agreement Act of 1937 (AMAA), 7 U.S.C. § 601 *et seq.*. As the Court explained, "Marketing orders promulgated pursuant to the AMAA are a species of economic regulation that has displaced competition in a number of discrete markets; . . ." *Id.* at 2134. The purpose of these marketing orders is to regulate and limit competition in order "to establish and maintain such orderly marketing conditions for [certain agricultural commodities] . . . as will provide . . . an orderly flow of the supply thereof to market throughout its normal marketing season to avoid unreasonable fluctuations in supplies and prices." 7 U.S.C. § 602(4). These marketing orders may impose uniform prices in a particular market, limitations on the quality and quantity of the commodity that may be marketed, determinations of grade and size of the commodity, and orderly disposition of any surplus that might suppress market prices. These marketing orders may also authorize joint research and development projects, inspection procedures, and standardized packaging requirements. *Id.*. *See, e.g.*, 7 U.S.C. § § 602(4) and 60c(6) .

(5) Because the generic advertising provisions at issue in *Wileman Bros.* were contained within a broad and detailed regulatory scheme that restricted competition and required collective action in order to stabilize markets, the Court held that the *Central Hudson* test applied by the Ninth

Circuit was inappropriate. "The Court of Appeals' decision to apply the *Central Hudson* test is inconsistent with the very nature and purpose of the collective action program at issue here." *Id.* at 2141.

(6) By contrast, the Mushroom Law in United Foods' case was not promulgated under the AMAA. Rather, it was promulgated pursuant to an entirely different statute, the "Mushroom Act" set forth in 7 U.S.C. § 6101 *et seq.* The purpose of the "Mushroom Act" has nothing to do with regulating markets by restricting competition and requiring collective action in the production, distribution, and sale of certain products. Contrary to the AMAA, the sole purpose of the "Mushroom Act" is to compel mushroom producers to finance advertising and promotional programs developed by the Mushroom Council. The "Mushroom Act" was enacted in 1990 to create:

> [A]n orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and

(3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101(6). The advertising and promotional purposes of the "Mushroom Act" bear no resemblance to the economic regulatory purposes of the AMAA.

(7). Because the regulatory scheme involved in the *Wileman Bros.* case was fundamentally different from the Mushroom Law at issue in United Foods' case, the Supreme Court's decision in *Wileman Bros.* is not dispositive of the constitutional issues raised by United Foods. Indeed, *Wileman Bros.* assists United Foods' position. The Supreme Court implied that but for the fact of an expansive regulatory scheme designed to stabilize markets, a generic advertising program would be unconstitutional. Because the Mushroom Law is neither designed nor intended to stabilize the mushroom market (it exists only to expand the market), its generic advertising program violates United Foods' First Amendment rights.

(8) In addition, in *Wileman Bros.* the Supreme Court did not address the equal protection issues that are present in United Foods' case. In *Wileman Bros.* there was no discussion of the constitutional ramifications of creating the kinds of exemptions from assessments that exist under the Mushroom Law.

WHEREFORE, United Foods prays for the following relief:

1. A judgment declaring that the Mushroom Law and the Mushroom Order violate United Foods' constitutionally guaranteed rights to freedom of speech and freedom of association under the First Amendment of the United States Constitution and United Foods' constitutionally guaranteed right to equal protection under the Fifth Amendment of the United States Constitution.

2. A judgment invalidating assessments under the Mushroom Order and declaring that United Foods shall not be subject to any such past, present or future assessments.

3. An Order granting United Foods a temporary and permanent injunction prohibiting the United States Department of Agriculture or the Mushroom Council from enforcing against United Foods any assessments under the Mushroom Law or the Mushroom Order.

4. An award of attorneys' fees and costs under the Equal Access to Justice Act.

5. Such further relief as the Court deems appropriate.

Respectfully submitted:

/s/ BRADLEY A. MACLEAN
BRADLEY A. MACLEAN
Bradley A, MacLean (B.P.R. #9562)
FARRIS, WARFIELD &
KANADAY, PLC
Suite 1900, SunTrust Center
424 Church Street
Nashville, Tennessee 37219
(615) 244-5200

Attorney for United Foods, Inc.

OF COUNSEL:

Brian C. Leighton
701 Pollasky
Clovis, California 93612
(209) 297-6190

**PROGRAM ANNOUNCEMENT**

United States
Department of Agriculture

Agricultural Marketing Service

Information Staff
P.O. Box 96456
Washington, D.C.
20090-6456
Release No. AMS-071-98

Carol Blake (202) 720-8998
cblake@usda.gov
Billy Cox (202) 720-8998
Billy_A_Cox@usda.gov

## MUSHROOM INDUSTRY VOTES TO CONTINUE PROMOTION PROGRAM

WASHINGTON, March 20, 1998—The U.S. Department of Agriculture today announced that the mushroom industry has voted to continue the promotion, research, and consumer information program for fresh mushrooms. The program is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990. USDA's Agricultural Marketing Service conducted a referendum Feb. 24 - March 13.

Dr. Enrique E. Figueroa, administrator of AMS, said, "The results of the referendum indicate that 80 percent of those who voted favored continuance of the order

and they represented 70 percent of the volume of mushrooms produced by those who voted."

The program needed the approval of a majority of the voters who represented more than 50 percent of the volume of mushrooms produced and imported by those voting in the referendum.

The program is administered by a council of nine industry representatives. The program is funded by an assessment rate of 0.45 of one cent per pound of mushrooms paid by persons who annually produce or import an average of more than 500,000 pounds of mushrooms.

#

*An electronic version of this news release can be obtained via the World Wide Web at:*

*http://www.ams.usda.gov/news/newsrel.htm*

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

---

MPRCIA Docket No. 95-1

IN RE: DONALD B. MILLS, INC.,
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS, PETITIONER

---

[Filed: Apr. 26, 1996]

---

**DECISION**

This is an administrative adjudicatory proceeding pursuant to 7 U.S.C. § 6106(a) in which Petitioner challenges provisions of the Mushroom Promotion, Research, and Consumer Information Act of 1990, as amended, (7 U.S.C. §§ 6101-6112) (the "Act"), and the Mushroom Promotion, Research, and Consumer Information Order (7 C.F.R. §§ 1209.1-1209.77) (the "Order"). This proceeding was instituted by a Petition, filed on March 15, 1995, by Donald B. Mills, Inc., in which Petitioner alleged that the Act and order violated provisions of the United States Constitution. Respondent, the Administrator of the Agricultural Marketing Service of the United States Department of Agriculture ("USDA" or the "Department"), filed an Answer on April 14, 1995, which denied that the Act or Order violated the Constitution.

A hearing was held in San Francisco, California, on August 15-17, 1995. Petitioner was represented by

Brian C. Leighton, Fresno, California. Respondent was represented by Gregory Cooper, Office of the General Counsel, United States Department of Agriculture.

The parties have submitted proposed findings, proposed conclusions, and numerous briefs. All proposed findings, proposed conclusions, and arguments have been considered. To the extent indicated, they have been adopted. Otberwise, they have been rejected as irrelevant or not supported by the evidence. In this opinion, "Tr." refers to the transcript of the hearing; "PX" refers to the numbered exhibits offered by Petitioner; and "RX" refers to the numbered exhibits offered by Respondent.

**Statutory and Regulatory Background**

The Mushroom Promotion, Research, and Consumer Information Act was enacted in 1990 to create:

> [A]n orderly procedure for developing, financing through adequate assessments on mushrooms produced domestically or imported into the United States, and carrying out, an effective, continuous, and coordinated program of promotion, research, and consumer and industry information designed to—
>
> (1) strengthen the mushroom industry's position in the marketplace;
>
> (2) maintain and expand existing markets and uses for mushrooms; and
>
> (3) develop new markets and uses for mushrooms.

7 U.S.C. § 6101.[12]

The Act provides for the establishment of an Order, 7 U.S.C. § 6103, and of the Mushroom Council, 7 U.S.C. § 6104(b), with power, *inter alia*:

(1) to administer the order in accordance with its terms and provisions;

. . . .

---

[12] The Act (7 U.S.C. § 6101(a)) contained the following findings:

(1) mushrooms are an important food that is a valuable part of the human diet;

(2) the production of mushrooms plays a significant role in the Nation's economy in that mushroom are produced by hundreds of mushroom producers, distributed through thousands of wholesale and retail outlets, and consumed by millions of people throughout the United States and foreign countries;

(3) mushroom production benefits the environment by efficiently using agricultural byproducts;

(4) mushrooms must be high quality, readily available, handled properly, and marketed efficiently to ensure that the benefits of this important product are available to the people of the United States:

(5) the maintenance and expansion of existing markets and uses, and the development of new markets and uses, for mushrooms are vital to the welfare of producers and those concerned with marketing and using mushrooms, as well as to the agricultural economy of the Nation;

(6) the cooperative development, financing, and implementation of a coordinated program of mushroom promotion, research, and consumer information are necessary to maintain and expand existing markers for mushrooms; and

(7) mushrooms move in interstate and foreign commerce, and mushrooms that do not move in such channels of commerce directly burden or affect interstate commerce in mushrooms.

(4) to propose, receive, evaluate, approve, and submit to the Secretary for approval under subsection (d) of this section budgets, plans, and projects of mushroom promotion, research, consumer information. and industry information, as well as to contract and enter into agreements with appropriate persons to implement such plans or projects;

. . . .

(6) to receive, investigate, and report to the Secretary complaints of violations of the order

. . . .

7 U.S.C. § 6104(c).

Assessments at a rate of $.0025 per pound, 7 U.S.C. § 6104(g)(2), are levied on mushroom producers and importers, 7 U.S.C. § 6104(g)(1). First handlers are required to collect such assessments from their producers and to remit the collected assessments to the Council. 7 U.S.C. § 6104(g)(1)(A).

Three categories of mushrooms or producers are excluded from assessments. First, assessments under the Act only apply to mushrooms ". . . grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed. . . ." Thus, the Act specifically excludes ". . . mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary." 7 U.S.C. § 6102(9). Second, assessments under the Act only apply to producers and importers who produce or import ". . . on average, over

500,000 pounds of mushrooms" annually for the fresh market. 7 U.S.C. §§ 6102(6) and (11). Third, assessments under the Act do not apply to exported mushrooms. 7 U.S.C. § 6104(g)(4).

**Findings of Fact**

1. Petitioner, Donald B. Mills, Inc., is a producer and first handler of mushrooms. Petitioner grows approximately three million pounds of mushrooms per year, with approximately 75% of them going to the fresh market (Tr. 729-30).

2. Petitioner's market is in Oakland, south San Francisco, and San Francisco (Tr. 727).

3. Pictsweet Mushroom Farms is one of the largest fresh mushroom producers in the United States. Pictsweet began operating in 1987, and its sales have increased every year (Tr. 595, 600-01).

4. Official government statistics indicate that in 1966, 75% of mushrooms produced in the United States were used for processing and 25% for fresh use. By 1993, 69% went for fresh use and only 31% went for processing (RX 69, p. 15).

5. In 1992-1993, total United States production of mushrooms for fresh use was valued at $537,922,000 (RX 69, pp. 12, 20). Exports of fresh mushrooms peaked in 1990, totaling approximately $22,000,000 (RX 43, p. 29).

6. United States per capita fresh mushroom consumption is far below that of Canada and other Western European nations (RX 43, pp. 7, 9).

7. In 1993-1994, there were approximately 355 producers and 520 million pounds of mushrooms for fresh use (RX 69, pp. 9, 15).

8. Mushrooms are grown commercially in many states (RX 69, p. 20, n. 5). However, 43% are produced in Pennsylvania and 17% are produced in California (Tr. 328-29). Less than 1% of the domestic fresh mushroom market is from imports (RX 24, p. 1).

9. There is not an over supply of mushrooms but an adequate supply (Tr. 276).

10. Mushrooms are not a homogeneous product because there are different varieties, there are different levels of service that are attached to all mushrooms that make their value different, there are different packaging types and styles, and the quality is very different (Tr. 658-60).

11. Mushrooms are impulse items, i.e., they are not an essential part of the consumer's life and their diet. Therefore, if the product does not look good, the consumers will not buy it (Tr. 660). Produce managers of grocery stores and grocery chains buy based upon consumer demand (Tr. 736).

12. Mushrooms have very little nutritional value (Tr. 327-28, 514).

13. Selling of fresh mushrooms must be in a very regional market because mushrooms cannot be shipped long distances and have an extremely short shelf life (Tr. 601).

14. On a national basis, there is no one company or companies that have a monopoly or oligopoly because of

the regional nature of the business, but regionally the opposite is true, where only a few producers control the market (Tr. 660-63).

15. The Mushroom Order became effective on January 8, 1993 (RX 27), and the Mushroom Council was first seated on June 24, 1993 (RX 60, p. 1).

16. The strategic plan of the Mushroom Council is to increase per capita consumption of mushrooms (Tr. 515-16). From 1970 through 1993, total mushroom consumption increased every year (Tr. 394), although per capita consumption decreased in the 1990's after having increased in the 1980's (Tr. 190; RX 43, p. 7).

17. The Mushroom Council began collecting assessments from mushroom producers and importers on August 1, 1993 (Tr. 200).

18. Assessments under the Mushroom Promotion, Research, and Consumer Information Act and the Mushroom Promotion, Research, and Consumer Information Order are levied on fresh mushroom producers and importers at a rate of $.0025 per pound. Assessment reports and checks are submitted monthly (Tr. 257).

19. Only producers or importers averaging over 500,000 pounds annually for the fresh domestic market are subject to assessments. One hundred fifty-two mushroom producers in the United States are subject to assessments as they each produce over 500,000 pounds of mushrooms for the fresh domestic market (Tr. 329). In 1995, the Mushroom Council collected assessments from these 152 producers encompassing

515-518 million pounds of mushrooms for fresh use (Tr. 252).

20. Fifty-nine fresh mushroom producers have filed exemptions with the Mushroom Council claiming that they produce 500,000 pounds or less of fresh mushrooms annually for the domestic market and are therefore exempt from assessments (Tr. 329).

21. Mushrooms for export and mushrooms for processing are excluded from the program.

22. Many fresh mushroom producers engage in individual promotion program that increase consumption (Tr. 730-31, 740-41, 750-56).

23. In 1995, the Mushroom Council had a budget of $1.3 million (Tr. 197). This is an extremely small budget (Tr. 127, 393). There are essentially three parts to the Council's promotion program: retail merchandising promotion, consumer publicity and education, and food service promotion (Tr. 229).

24. The Mushroom Council's president and public relations director have engaged in an aggressive, imaginative campaign of advertising and promotion. This has included preparation of press releases, articles, brochures, kits, and photographs which are distributed to newspapers, radio stations, retailers, consumers, and even schools. These materials are attractive and informative. Much free publicity has been obtained as a result of the Council's efforts.

25. Econometric modeling is a precise method of measuring the effectiveness of a promotion program (Tr. 28-29). The Mushroom Council's Program cannot

be measured econometrically because it began mainly in 1995, and several years data is necessary to conduct a complete analysis (Tr. 32-33, 103).

26. Neither the Mushroom Council nor any of the firms that it has employed have done any study to determine whether or not the Council's programs have increased demand for mushrooms (Tr. 299-301).

27. None of the promotional and educational programs engaged in by the Mushroom Council has revealed any increase in consumption, price, or demand for mushrooms (Tr. 294, 324, 517-18, 522-25, 642-44, 648-49, 740-51).

**Discussion**

**First Amendment Analysis**

**I. The Criteria to be Applied**

Petitioner argues that two decisions of the United States Court of Appeals for the Ninth Circuit apply to this case and, based upon those decisions, the Mushroom Promotion Program established by USDA violates the First Amendment of the United States Constitution and is, therefore, unconstitutional. The cases are *Wileman Bros. v. Espy*, 58 F.3d 1367 (9th Cir. 1995) and *Cal-Almond v. United States Dep't of Agric.*, 14 F.3d 429 (9th Cir. 1993). Respondents argues that these cases do not apply to the facts at hand, are incorrectly decided, and should not be followed.[13]

---

[13] USDA filed a petition for a *writ of certiorari* in the United States Supreme Court in *Wileman* (Jan. 24, 1996).

The Ninth Circuit held that the government's generic advertising programs for California peaches, nectarines, and plums in *Wileman* and for almonds in *Cal-Almond* were invalid because they did not comply with a three-part test enunciated by the Supreme Court in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557 (1980).

In *Central Hudson*, the Supreme Court held that "[t]he First Amendment, as applied to the States through the Fourteenth Amendment, protects commercial speech from unwarranted governmental regulation." *Central Hudson*, 447 U.S. at 561. If commercial speech is neither misleading nor related to unlawful activity, restrictions on such speech must: 1) implement a substantial government interest; 2) directly advance that interest; and 3) be narrowly tailored to achieve the desired objective. *See Board of Trustees v. Fox*, 492 U.S. 469 (1989).

In accordance with the decisions of the Ninth Circuit in *Cal-Almond* and *Wileman*, I find that the Mushroom Promotion Program in this case does not satisfy the Supreme Court's three-part *Central Hudson* test. Although there is a substantial government interest in connection with the Mushroom Program, the program does not directly advance that interest and is not sufficiently narrowly tailored.

**A. Substantial Government Interest**

Congress stated that the mushroom legislation was passed to "strengthen the mushroom industry's position in the market place," "maintain and expand existing markets . . ." and "develop new markets and uses for mushrooms." 7 U.S.C. § 6101. The Ninth Circuit

has held that there is a substantial and legitimate government interest in creating effective mandatory cooperative promotion and information programs to stimulate market demand for the financial benefit of the producers in the peach and nectarine industry in *Wileman* and the almond industry in *Cal-Almond*. The court in *Cal-Almond* required no specific analysis of the almond industry or its profitability trends before it concluded: "We agree that stimulating the demand for almonds in order to enhance returns to almond producers and stabilize the health of the almond industry is a substantial state interest." *Cal-Almond*, 14 F.3d at 437.

Similarly, the court in *Wileman* endorsed the same conclusion although there was absolutely no evidence suggesting that the treefruit industry was in any distress that required rescuing. *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1378 (9th Cir. 1995).

I find, therefore, that the government's interest in promoting and expanding the mushroom industry is substantial.

**B. Direct Advancement**

The court in *Cal-Almond* stated, "As a starting point for our analysis, therefore we must determine how effective the Board's own almond promotion efforts are." *Cal-Almond*, 14 F.3d at 437.

A court will not merely assume that the legislative program will always advance the asserted state interest sufficiently to justify its abridgment on commercial free speech. *City Council v. Taxpayers for Vincent*,

466 U.S. 789, 803 n. 22 (1984). As the court held in

*Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1592 (1985),

> In *Edenfield*, we decided that the Government carries the burden of showing that the challenged regulation advances the Government's interest 'in a direct and material way.' *Id.*, at ___, 113 S. Ct., at 1798. That burden 'is not satisfied by mere speculation and conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' (internal citation omitted).

The Supreme Court assumes as a matter of law that advertising increases consumption of the product being advertised. *See, e.g., Wileman*, 58 F.3d at 1378; *Cal-Almond*, 14 F.3d at 439; *Posadas de Puerto Rico Assoc. v. Tourism Co. of Puerto Rico*, 478 U.S. 328, 342 (1986). As stated by the Ninth Circuit in *Wileman*, "the question is whether the mandatory generic advertising program sells the product more effectively than the 'specific, targeted marketing efforts of individual handlers.'" *Wileman*, 58 F. 3d at 1378 (citing *Cal-Almond*, 14 F.3d at 439).

In *Cal-Almond*, almond handlers presented evidence that the assessments collected by the Almond Board hindered their own advertising efforts. Because the Secretary could not provide evidence that the generic advertising program was more effective at promoting almonds than the individual efforts of the handlers, the

Ninth Circuit held that the Almond Board's advertising and promotion program did not directly advance the government's interest:

> We agree with [the handlers'] argument that each handler knows best how to sell his own almonds; we are unwilling to presume, in the absence of hard evidence to the contrary, that a government agency is better at marketing than an individual businessperson.

*Cal-Almond*, 14 F.3d at 439.

Similarly, in *Wileman*, the Ninth Circuit stated:

> [T]he Secretary has demonstrated that advertising increases consumption of peaches and nectarines but has not gone the necessary next step of demonstrating that the generic advertising program is better at increasing consumption than individualized advertising, as *Cal-Almond* requires. Thus, the generic advertising programs for peaches and nectarines do not "directly advance" the government's interest and fail the second prong of the *Central Hudson* test.

*Wileman*, 58 F.9d at 1379.

Petitioner contends that "there is absolutely no evidence presented by the government that the Mushroom Council's mandatory assessment program for promotion, education and advertising has substantially increased [the] government interest [in increasing sales of mushrooms]." (Petitioner's Brief at 16). This point is confirmed by Respondent's witnesses and other evi-

dence. Wade Whitfield, the president and CEO of the Mushroom Council since October 1, 1993, testified that neither the Council nor any of the firms that it has employed have done any study to determine whether or not the Council's programs have increased demand for mushrooms (Tr. 299-301). Similarly, Robyn Wilk, the Mushroom Council's public relations director, testified that the Mushroom Council has no information that any of the programs completed is 1995 have increased the consumption or sale of mushrooms (Tr. 517-18). Additionally, John Haltom, president of Pictsweet Mushroom Farms, another mushroom producer, and also treasurer of the Mushroom Council, testified that he has seen no measurable improvement and no impact from the Council's promotional and educational research efforts (Tr. 642-44).

In 1995, the Mushroom Council had a budget of $1.3 million (Tr. 197). There were three main categories of spending by the Council in 1995: 1) retail merchandising promotion; 2) consumer publicity and education; and 3) food service promotion (Tr. 229).

The efforts of the Mushroom Council are impressive and commendable. For example, a "color page" advertisement was prepared for newspapers with mushroom photography, facts, and recipes, and has, to date, been run in more than 160 newspapers (Tr. 227, 498; RX 74, items 3-5; RX 75). The page won an award as one of the top 20 pages of the year (Tr. 525-26). In addition, the Council distributed the "Blueprint for Profit," a retail kit with a shelf layout schematic, care and handling cards for consumers, and a full color chart for produce clerks showing varieties, uses, flavors, and handling requirements, to half of the country's supermarkets and

1,500 smaller stores (Tr. 230, 236-45; RX 72, items 5, 6). The Council also developed a comprehensive education program to help raise children's preferences for mushrooms (Tr. 452-54; RX 58, pp. 6, 8).

Econometric modeling is a precise method of measuring the effectiveness of a promotion program. The mushroom industry cannot be measured econometrically because the program is relatively new, and several years' data are necessary to conduct a complete analysis (Tr. 32-33, 103). Thus, although the public relations and educational programs run by the Council were performed very well, the Council has seen no measurable benefit in increased sales of mushrooms as a result of those programs (Tr. 648-49).

The Department has demonstrated that advertising increases consumption of mushrooms. However, the Department has not shown that the efforts of the Mushroom Council are better at increasing consumption than the individual efforts of the mushroom handlers. None of the government witnesses could substantiate that any part of their program increased sales of, demand for, or the price of mushrooms, nor could they show that new markets had been expanded, new uses had been found, or that the program strengthened the mushroom industry's position in the marketplace (Petitioner's Brief at 17). Thus, the Mushroom Council's program has not "directly advanced" the government's interest and fails the second part of the *Central Hudson* test.

**C. Narrowly-Tailored**

Respondent contends that the Mushroom Council's program has been properly designed based on exten-

sive research, testing, and accepted promotional techniques and is sufficiently narrowly tailored to promote mushroom sales. Respondent must also demonstrate that the Mushroom Order and Regulations are no more extensive than necessary to serve the interest of promoting mushroom sales. In *Board of Trustees of State Univ. v. Fox*, 492 U.S. 469, 480 (1989), the Supreme Court held that this standard is not as strict as a "least restrictive means" test:

> What our decisions require is a "'fit' between the legislature's ends and the means chosen to accomplish those ends,"—a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is "in proportion to the interest served"; that employs not necessarily the least restrictive means but . . . a means narrowly tailored to achieve the desired objective.

(internal citations omitted).

In *Rubin v. Coors Brewing Co.*, 115 S. Ct. 1585, 1593-94 (1995), the Court stated that the availability of options, "all of which could advance the Government's asserted interest in a manner less intrusive to . . . [a handler's] First Amendment rights, indicates that the . . . [government action] is more extensive than necessary."

Petitioner asserts that the Mushroom Council's program is more restrictive than necessary to achieve the governmental purpose because: 1) a portion of the assessments collected by the Council is being used for commission overhead and expenses, thereby duplicating the handlers' own overhead expenses for marketing their mushrooms; 2) handlers are not given credit for

their own promotional and marketing efforts and expenses, thereby discouraging private advertising; 3) producers of five hundred thousand pounds or less of fresh mushrooms annually, those that process mushrooms, and mushroom exporters are not required to pay the assessments and receive a "free ride" from their larger competitors; and 4) the Mushroom Council's efforts will spread the idea that all fresh mushrooms and brands are the same which undercuts Petitioner's message that its mushrooms are better (Petition at 5-6).

In *Cal-Almond*, the Ninth Circuit held that although handlers could receive credit for their own promotional and advertising programs, the types of promotions and advertising for which a handler could get credit were too limited, and therefore, the program was "more extensive than necessary to serve the interest of increasing almond sales." *Cal-Almond*, 14 F.3d at 440. In *Wileman*, the court stated that since no credit whatsoever was given to the peach and nectarine handlers for their individual advertising and promotion efforts, it was consequently far more extensive than necessary to carry out the governmental purpose. *Wileman*, 58 F.3d at 1379-80.

Similarly, mushroom handlers do not receive credit for their own advertising and promotion efforts. Therefore, the Mushroom Council's program is not narrowly tailored and fails the third part of the *Central Hudson* test.

In conclusion, although the Department has a substantial interest in promoting mushrooms, the forced contributions to the Mushroom Council contravene the First Amendment rights of mushroom handlers. The Mushroom Council's program neither directly advances

the government's interest, nor is it sufficiently narrowly tailored. The program, therefore, fails to satisfy the second and third parts of the *Central Hudson* test and violates the First Amendment.

In accordance with the determinations by the Ninth Circuit in *Wileman* and *Cal-Almond*, since the Mushroom Council's program has been found unconstitutional under the less stringent standard for commercial speech set forth in *Central Hudson*, it is unnecessary to reach the issue of whether the program meets the Supreme Court's test for permissible government restriction on freedom of association. *Wileman*, 58 F.3d at 1377-78; *Cal-Almond*, 14 F.3d at 436.

**II. Should *Cal-Almond* and *Wileman* be Followed?**

Respondent argues that the Department of Agriculture should not follow the decisions of the Ninth Circuit in *Wileman* and *Cal-Almond* (Respondent's Brief at 20-26), stating in its reply brief that "[t]he Secretary enjoys a national jurisdiction and is not constrained by law or policy to knee-jerk subservience to the dictates of any district or circuit court." (Reply Brief at 1). Respondent contends that if these decisions are followed, they may lead to direct annihilation of all the advertising and promotion programs under the Agricultural Marketing Agreement Act of 1937 (Respondent's Brief at 23). Instead, Respondent asserts that the applicable laws to be followed are the decisions of the Judicial Officer rather than the Ninth Circuit, even if the case is within the Ninth Circuit.

Respondent states that "government speech" is implicated by the activities of the Mushroom Council,

citing *Keller v. State Bar of California*, 496 U.S. 1, 12-13 (1990), in which the Supreme Court held:

> If every citizen were to have a right to insist that no one paid by public funds express a view with which be disagreed, debates over issues of great concern to the public would be limited to those in the private sector, and the process of government as we know it radically transformed.

Moreover, Respondent relies upon *Lebron v. National R. R. Passenger Corp.*, 115 S. Ct. 961 (1995), in which the Court held that Amtrak was part of the government for the purposes of the First Amendment. Finally, Respondent argues that the Supreme Court has never recognized any First Amendment right not to be compelled to do commercial promotion or advertising, although the Court has held that there is a right not to be compelled to make ideological speech in such cases as *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); and *Wooley v. Maynard*, 430 U.S. 705 (1977).

I disagree with Respondent's contention that the decisions of the Ninth Circuit are not binding upon the Department of Agriculture in cases that arise in the Ninth Circuit. The only two cases in which the issue of whether the Department must follow a particular Circuit has arisen are *In re Sparkman*, 50 Agric. Dec. 602 (1991) and *In re Stamper*, 41 Agric. Dec. 1935, 1949 (1982). Admittedly, both cases apply to the Horse Protection Act and not to a marketing order. However, the fact is that the Department has followed the rule of the Eighth Circuit within the Eighth Circuit, although

it has chosen not to follow these cases outside of the Eighth Circuit. Similarly, I conclude that I am bound to follow the decisions of the Ninth Circuit within the Ninth Circuit.

Respondent's argument that government speech is implicated by the activities of the Mushroom Council was previously addressed in *United States v. Frame*, 885 F.2d 1131 (3d Cir. 1989). In *Frame*, the Third Circuit stated that there were "sound reasons" for concluding that the expressive activities financed by the Beef Promotion Act constituted 'government speech.' 883 F.2d at 1131-32. However, the court held ultimately that although a "close" question was presented, government speech was not implicated and the Beef Board was not part of the government for First Amendment purposes. *Id.* I believe that decision applies to the facts in this case.

It is true that the Supreme Court has never recognized any First Amendment right not to be compelled to do commercial promotion or advertising in the many cases it has decided pursuant to the First Amendment and in which the *Central Hudson* test has been applied. However, as I have previously determined, the Ninth Circuit in *Wileman* and in *Cal-Almond* has extended the Supreme Court decisions to this situation, and I am bound to follow those decisions.

**Equal Protection Analysis**

A second argument made by Petitioner is that the Act violates the Equal Protection clause of the Fifth Amendment by generally exempting producers who produce: 1) 500,000 pounds or less per year, 2) process mushrooms, or 3) export mushrooms (Petition at 6).

The Fifth Amendment contains an implicit Equal Protection component that prohibits the federal government from discriminating between individuals and groups. *Washington v. Davis*, 426 U.S. 229, 239 (1976) (citing *Bolling v. Sharpe*, 347 U.S. 497 (1954)); *United States v. Frame*, 885 F.2d 1119, 1137 (3d Cir. 1989). The general rule is that legislation is presumed to be valid and will be sustained if the statute's classification scheme is rationally related to a legitimate government interest unless the statute creates a suspect clarification that impinges upon a constitutionally protected right. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 444 (I985); *Cecelia Packing v. United States Dep't of Agric.*, 10 F.3d 616, 624 (9th Cir. 1993). The Equal Protection analysis requires a two-part inquiry: 1) whether the challenged legislation has a legitimate government purpose; and 2) whether the challenged classification is rationally related to that legitimate government purpose. Rational-basis scrutiny is "the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *City of Dallas v. Stanglin*, 490 U.S. 19, 26 (1989). "All that is needed . . . to uphold the . . . [classification] scheme is to find that these are 'plausible,' 'arguable,' or 'conceivable' reasons which may have been the basis for the distinction." *Brandwein v. California Bd. of Osteopathic Examiners*, 708 F.2d 1466, 1472 (9th Cir. 1983) (internal citations omitted).

**I. Legitimate Government Purpose**

Congress declared that the purpose of the Mushroom Act was to strengthen the mushroom industry's position in the marketplace, maintain and expand existing markets and uses for mushrooms, and develop new markets and uses for mushrooms. 7 U.S.C. § 6101(b). I agree with Respondent that the "primary purpose of this legislation is to create a mandatory cooperative information and promotion program to maintain and expand the domestic fresh mushroom market for the financial benefit of producers and the industry." (Respondent's Brief at 10). The Supreme Court has recognized the legitimate governmental interest in creating other mandatory marketing order programs for "advancing the interests or producers" and to "raise producer prices." *Block v. Community Nutrition Institute*, 467 U.S. 340, 342 (1984). Moreover, as discussed above, the Ninth Circuit has held that there is a substantial and legitimate government interest in creating effective mandatory cooperative promotion and information programs to stimulate market demand for the financial benefit of the producers and the industry. *See Wileman*, 58 F.3d at 1378; *Cal-Almond*, 14 F.3d at 437. I, therefore, find that the government's purpose in strengthening the mushroom industry is legitimate.

**II. Rational Relationship**

The second step in the Equal Protection analysis is the determination of whether the exclusion of three specific groups of mushrooms or producers from the collection of assessments by the Mushroom Council is rationally related to the legitimate governmental purpose of strengthening the mushroom industry. Three

categories of mushrooms or producers are excluded from assessments. First, assessments under the Act only apply to mushrooms ". . . grown within the United States for the fresh market, or imported into the United States for the fresh market, that are marketed. . . ." Thus, the Act specifically excludes ". . . mushrooms that are commercially marinated, canned, frozen, cooked, blanched, dried, packaged in brine, or otherwise processed, as may be determined by the Secretary." 7 U.S.C. § 6102(9). Second, assessments under the Act only apply to producers and importers who produce or import ". . . on average, over 500,000 pounds of mushrooms" annually for the fresh market. 7 U.S.C. §§ 6102(6) and (11). Third, the assessments under the Act do not apply to exported mushrooms. 7 U.S.C. § 6144(g)(4).

**A. Exclusion of Mushrooms for Processing**

Mushroom growers receive $1.03 per pound for mushrooms sold in the fresh market, but only $.66 per pound for mushrooms sold for processing (RX 69, p. 16). This difference in return has increased significantly over the last thirty years; in 1966, the difference in price was only $.15 per pound. Similarly, in 1993, 69% of mushrooms were sold in the fresh market, and only 31% of mushrooms were used for processing (RX 69, p. 15). Since the fresh market is the most lucrative mushroom market, it is conceivable that Congress could rationally conclude that only fresh mushroom producers should be subject to assessments because such producers would receive the majority of the benefit from increased mushroom consumption and sales.

**B. *Exclusion of Mushroom for Export***

In 1992-1993, total United States production of mushrooms for fresh use was valued at $537,922,000 (RX 69, pp. 12, 24). Exports of fresh mushrooms peaked in 1990 totaling only $22,000,000 (RX 43, p. 29). Thus, exports constitute approximately 4% of total United States mushroom production. Therefore, it is rational that Congress would choose to focus on the domestic market, thereby avoiding the administrative expense of worldwide marketing and distribution of promotional materials by the Mushroom Council.

**C. Exclusion of Producers of 500,000 Pounds or Less**

In 1993-1994, there were approximately 355 producers and a total production of 520 million pounds of mushrooms for fresh use (RX 69, pp. 9, 15). In 1995, the Mushroom Council collected assessments from 152 producers, who in total accounted for 515-518 million pounds of fresh mushrooms (Tr. 252). Therefore, there are approximately 203 producers who produce a total of 11-14 million pounds of fresh mushrooms per year. Such producers are excluded from the assessments collected by the Mushroom Council.

Presently, the Mushroom Council receives monthly reports and assessment checks from 152 producers, processes them, and keeps records for each producer (Tr. 257, 265). As noted by Respondent, if the identification and collection efforts for the 203 excluded producers were entirely successful, the Mushroom Council would receive an additional 535,000 per year based upon the computation of 14 million pounds times $.0025 per pound. Congress could have rationally concluded that the administrative costs associated with the collection

*and identification of these small producers* was not justified.

Since all three challenged classifications are rationally related to the legitimate government purpose of strengthening the mushroom industry, the Mushroom Act and Order fully comply with the Equal Protection clause of the Fifth Amendment.

**Conclusions of Law**

1. The Mushroom Promotion Program violates the First Amendment of the United States Constitution.

2. The Mushroom Promotion Program does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

April 26, 1996

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

---

MPRCIA Docket No. 95-1

IN RE: DONALD B. MILLS, INC.,
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS, PETITIONER

---

[Filed: June 12, 1996]

---

**DECISION ON RESPONDENT'S MOTION FOR RECONSIDERATION**

On April 26, 1996, I issued an Initial Decision in which I found that the Mushroom Promotion Program: (1) violates the First Amendment of the United States Constitution; and (2) does not violate the Equal Protection requirements of the Fifth Amendment of the Constitution. *In re Donald B. Mills, Inc.*, 55 Agric. Dec. ___ (MPRCIA Docket No. 95-1, Apr. 26, 1996).

On May 22, 1996, Respondent filed a Motion for Reconsideration that contended that the Initial Decision overlooked or misapprehended relevant points of law and fact. Respondent argues in its motion that: (1) the Initial Decision overlooked recently enacted relevant legislation; (2) the Initial Decision contains an improper legal analysis; and (3) Petitioner has abandoned its earlier arguments.

On June 3, 1996, Petitioner filed a response in which it opposed the Motion for Reconsideration.

On June 4, 1996, the American Mushroom Institute ("AMI") filed a Motion to Intervene in Support of Respondent's Motion to Reconsider for the purpose of filing an attached brief and participating in any oral argument pursuant to 7 C.F.R. § 900.57.

Section 900.57 provides, in part:

> Intervention in proceedings subject to this subpart shall not be allowed, except that, in the discretion of the Secretary or the judge, any person (other than the petitioner) showing a substantial interest in the outcome of a proceeding shall be permitted to participate in the oral argument and to file a brief.

The rules applicable to petitions to modify or be exempted from the Mushroom Act and Order, 7 C.F.R. § 1200.50 *et seq.*, specifically adopt and incorporate the provisions of 7 C.F.R. § 900.57 as a procedural rule applicable to Mushroom Act and Order petition proceedings. 7 C.F.R. § 1200.52(b).

Although there will be no oral argument with respect to the Motion, because AMI has a substantial interest in the outcome of this proceeding, it will be permitted to intervene for the purpose of filing its brief. The Motion to Intervene indicates that the American Mushroom Institute is a national, nonprofit trade association and that its membership includes more than 100 commercial-size mushroom farms in the United States representing over 90% of domestic mushroom production.

AMI asserts five arguments. First, since the Supreme Court granted the Solicitor General's Petition for Certiorari in *Wileman* on June 3, 1996, AMI argues

that I should vacate my Initial Decision and await further guidance pending the Court's resolution of the applicable First Amendment issues. Second, AMI contends that I should follow "official Department of Agriculture policy" as articulated by the Solicitor General in the Petition for Certiorari in *Wileman*, and revise my Initial Decision accordingly. Third, AMI joins in Respondent's argument that recently enacted legislation clarified Congressional intent with respect to the Mushroom Act and Order, the Agricultural Agreement Act of 1937, and other Federal commodity promotion laws. Fourth, AMI agrees with Respondent that Petitioner has abandoned its earlier arguments. Fifth, AMI reiterates First Amendment arguments that Respondent previously made and were considered in the Initial Decision. Since the latter arguments were discussed in the Initial Decision, they will not be discussed again in this Decision.

Upon reconsideration, I adhere to my Initial Decision for the reasons set forth in the Initial Decision and for the following reasons:

### I. The Recently Enacted Legislation.

Both Respondent and AMI argue that the Initial Decision overlooked recently enacted relevant legislation. (Respondent's Motion at 2; Intervenor's Brief at 7). On April 4, 1996, the Federal Agriculture Improvement and Reform Act of 1996 ("the 1996 Act") was signed into law. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 888

(1996). Section 501 of the Act provides, in relevant part:

> (b) FINDINGS.—Congress finds the following:
>
> . . . .
>
> (3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.
>
> . . . .
>
> (9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.
>
> . . . .
>
> (c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS.—Except as otherwise provided by law, each commodity board established under the supervision and

> oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

§ 501, 110 Stat. at 1029-31.

Respondent argues that "Congress has stated that its goals are not, and have never been, the same as individual handler promotion goals and cannot validly be judged on any such comparative basis." (Respondent's Motion at 4-5). The 1996 Act recognizes that the goal of any commodity promotion program is to expand and enhance the market for the particular commodity that is being promoted, rather than the share of the market for any individual producer. Similarly, the Ninth Circuit in *Cal-Almond* and *Wileman* recognized that there was a substantial government interest in stimulating and expanding the overall market demand for almonds and peaches and nectarines, respectively. *Cal-Almond v. United States Dep't of Agric.*, 14 F.3d 429, 437 (9th Cir. 1993); *Wileman Bros. & Elliott v. Espy*, 58 F.3d 1367, 1378 (9th Cir. 1995). In the Initial Decision, I stated that "the government's interest in promoting and expanding the mushroom industry is substantial." (Initial Decision at 10). This analysis is not premised on the goal of expanding the share of an individual mushroom producer or handler, but on

increasing the overall demand for mushrooms in general.

Respondent further contends that Congress "clarified that the lack of credits for individual promotion of mushrooms does not detract from Congress' conclusion that the mushroom act is very narrowly tailored to fulfill Congress' purposes . . . ." (Respondent's Motion at 4). Although Respondent contends that the recent legislation was enacted "[u]ndoubtedly in response to the *Wileman* decision," (Respondent's Motion at 3), there is no indication in the legislative history of the 1996 Act that *Wileman*, *Cal-Almond*, or the Mushroom Council's program were considered by either the House or the Senate in enacting that legislation.

In the Initial Decision, I stated that "mushroom handlers do not receive credit for their own advertising and promotion efforts. Therefore, the Mushroom Council's program is not narrowly tailored. . . ." (Initial Decision at 15). A general statement by Congress which does not focus on the specifics of the mushroom industry and the Mushroom Council's promotion program does not change my analysis. Furthermore, deference to legislative findings cannot limit judicial inquiry when constitutional rights are involved. *See, e.g., Sable Communications of California, Inc. v. F.C.C.*, 492 U.S. 115, 129 (1989).

Finally, Respondent contends that Congress described in the 1996 Act the proper time for measuring the effectiveness of a commodity promotion program. (Respondent's Motion at 6). Although Congress established five years as the appropriate time period for each commodity board to conduct an independent evaluation of program effectiveness, it did not say that the courts

could not evaluate a program before that time to determine constitutionality.

**II. The Correct Analysis Was Applied.**

Respondent's second argument is that, assuming *arguendo* that *Wileman* should be followed, the Initial Decision overlooked or misapprehended that the proper comparison to make in determining whether the direct advancement prong of *Central Hudson* has been satisfied "is between the Council's promotion program and a producer's promotion program." (Respondent's Motion at 6). In *Wileman* and *Cal-Almond*, the assessments were made upon handlers, not producers. As found in my Initial Decision, however, "[a]ssessments under the Mushroom Promotion, Research, and Consumer Information Act, and the Mushroom Promotion, Research, and Consumer Information Order are levied on fresh mushroom producers and importers . . ." (Finding of Fact 18).

On page 13 of the Initial Decision, I stated:

> The Department has demonstrated that advertising increases consumption of mushrooms. However, the Department has not shown that the efforts of the Mushroom Council are better at increasing consumption than the individual efforts of the mushroom *handlers*. None of the government witnesses could substantiate that any part of their program increased sales of, demand for, or the price of mushrooms, nor could they show that new markets had been expanded, new uses had been found, or that the program strengthened the mushroom industry's position in the marketplace (Petitioner's Brief at 17). Thus, the Mushroom Council's program

> has not "directly advanced" the government's interest and fails the second part of the *Central Hudson* test.

(emphasis added).

Clearly, the second sentence of this paragraph refers to handlers, not producers of mushrooms. However, the statement applies equally to producer-handlers of mushrooms, of which Respondent contends there are currently 59. (Respondent's Motion at 7).

Respondent contends that producers of mushrooms do not engage in promotion. However, the evidence indicates that Petitioner, a producer-handler, is engaged in personal selling techniques by meeting with produce managers and buyers to maintain existing markets and to develop new markets. Such personal selling is done in face-to-face meetings and telephone calls to produce brokers, buyers, and managers. Petitioner argues that the amounts of money that it must pay to the Mushroom Council reduce the money that it can devote to personal selling. (Petitioner's Response to Pre-Hearing Order I at 8). Petitioner also argues that if it did not have to pay the assessment, it would install new air conditioning, allowing for increased production and an even better quality product. (Petitioner's Brief at 12-13; Tr. 746-47).

To the same effect, Petitioner presented evidence that Pictsweet Mushroom Farms, a large producer-handler of mushrooms, engages in substantial promotion. Pictsweet does many things to increase the sale of and demand for mushrooms: (1) providing personal service; (2) using its sales force to contact customers directly; (3) developing merchandising plans for

customers; (4) providing paper bags in grocery stores because mushrooms last longer if they are stored in paper bags; (5) engaging in promotion and advertising programs with retailers; and (6) providing recipes for retailers to distribute to consumers. (Tr. 615-17). Pictsweet also provides promotional material to retailers, price discounts when retail stores put mushrooms on sale, and money for joint advertising. (Tr. 617-19). John Haltom, Pictsweet's president, testified that Pictsweet's individual advertising and promotion efforts have been successful in increasing the sale of mushrooms. (Tr. 640).

In the Initial Decision, I stated that "although the public relations and educational programs run by the Council were performed very well, the Council has seen no measurable benefit in increased sales of mushrooms as a result of these programs (Tr. 648-49)." (Initial Decision at 13). Because the evidence has not shown that the Mushroom Council was better able to promote and increase consumption of mushrooms than such producer-handlers, or to increase consumption at all, the Mushroom Promotion Council's program has not been shown to directly advance the government's interest in stimulating and expanding the mushroom industry.

### III. Petitioner Has Not Abandoned Its Earlier Arguments.

Respondent and AMI argue that Petitioner has abandoned its earlier arguments by stating in an *amici curiae* brief submitted to the United States Supreme Court in *Wileman* that "[t]he Ninth Circuit decision is not binding on any other governmental mandatory promotion and advertising program, whether it be a

federal program or a state program—as the federal or state government, respectively, can make a showing that other agricultural programs meet the *Central Hudson* test. . . ." (Respondent's Motion at 8-9; Intervenor's Brief at 11-12). Petitioner has not conceded that *Wileman* is inapplicable to all promotion programs; Petitioner has merely stated that each promotion program must be evaluated on its individual facts.

### IV. The Initial Decision Need Not Await Further Guidance From The Supreme Court.

AMI contends that I should vacate my Initial Decision and await further guidance from the Supreme Court, which on June 3, 1996, granted the Solicitor General's Petition for Certiorari in *Wileman. Glickman v. Wileman Bros. & Elliott, Inc.*, 58 F.3d 1367 (9th Cir. 1995), *cert. granted*, 64 U.S.L.W. 4675 (U.S. June 3, 1996) (No. 95-1184). (Intervenor's Brief at 2). On May 20, 1996, the Solicitor General also filed a Petition for Certiorari seeking review of the *Cal-Almond* decision, but asking the Court to withhold action pending the resolution of the First Amendment issues in *Wileman. United States Dep't of Agric. v. Cal-Almond, Inc.*, 67 F.3d 874 (9th Cir. 1993), *petition for cert. filed*, 64 U.S.L.W. 4584 (U.S. May 28, 1996) (No. 95-1879). In support of this argument, AMI states that the Judicial Officer issued an Order to Show Cause why he should not "forestall" his Decision and Order and await "the outcome of proceedings for judicial review of *Wileman* and *Cal-Almond*," in a second *Cal-Almond* case currently on appeal within the Department. ("*Cal-Almond II*").

I believe that it would be counterproductive to judicial efficiency to vacate and/or stay the Initial Decision. Unlike the Judicial Officer in *Cal-Almond II*, I have already considered the arguments presented by Respondent and Petitioner and issued a written decision in this matter from which an appeal to the Judicial Officer already has been filed. Upon appeal, if the Judicial Officer wishes to stay this matter pending resolution of the First Amendment issues by the Supreme Court in *Wileman*, then both *Cal-Almond II* and the instant case can be stayed at the same level.

### V. The Solicitor General's Position Is Not Controlling.

AMI argues that the legal position of the Secretary of Agriculture with respect to the issues involved in the instant case is clearly set forth in the Solicitor General's Petition for a Writ of Certiorari in *Wileman* and that I am bound to follow this position. (Intervenor's Brief at 7). Although the Solicitor General filed a Petition for Certiorari in *Wileman* on behalf of the Department, it is unclear that the Solicitor's brief represents official Department policy rather than the position of the Office of the General Counsel.

As an administrative law judge, it is my duty to decide cases in accordance with applicable legal authority. In the instant case, until such decisions are reversed or modified, the Ninth Circuit decisions of *Wileman* and *Cal-Almond* must be followed. Based upon the analysis required by these cases—the application of the *Central Hudson* test to the Mushroom Council's program—I have found that the Mushroom Council's program violates the First Amendment.

The Office of the General Counsel, representing USDA, is a litigating party in all cases that are heard and decided by United States Department of Agriculture administrative law judges. Nevertheless, the function of administrative law judges in this Department, as well as in all other departments and agencies throughout the federal government in which the departments and agencies are parties, is to impartially adjudicate the issues rather than automatically adhere to the views of the departments and agencies who are litigating parties. Anything less would undermine the very essence of the Administrative Procedures Act and its concept of independent federal administrative law judges.

Accordingly, upon reconsideration, I affirm my Initial Decision.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN

June 12, 1996 Administrative Law Judge

UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

HEARING

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOMS

VOLUME I

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Tuesday
August 15, 1995

The hearing was convened, pursuant to Notice, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

[Testimony of Wade Whitfield]

* * * * *

[1-276]

Q Is there a surplus of fresh mushrooms?

A Is there a surplus of fresh mushrooms?

Q Yes.

A No, I couldn't say there was a surplus of fresh mushrooms. There might—the term might be "an adequate supply."

Q The term might be an inadequate supply?

A An adequate supply.

Q So there is not a problem with mushrooms with respect to overproduction of mushrooms. Correct?

A I don't think there is at this time, an overproduction. There's a possibility of being; . . .

* * * * *

[1-294]

Q Does the Council have any statistics showing that there was any increase sales of mushrooms as a result of that Let Your Love Mushroom campaign?

A I don't have my production volume sheet here with me. The only knowledge I have is one of our cou[n]cil members did say that, in his analysis, it did

increase consumption. It did increase, and that's the only thing I heard.

Q Now—

A We have no documentation.

* * * * *

UNITED STATES OF AMERICA

---

DEPARTMENT OF AGRICULTURE

---

HEARING

---

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION,
D/B/A/ DBM MUSHROOM

---

VOLUME II

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Wednesday
August 16, 1995

The hearing was convened, pursuant to adjournment, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

[Testimony of Wade Whitfield]

* * * * *

[2-320]

Q And do you know what that quantity is then?

A Of what?

Q Of processed mushrooms for 1995?

A I could give you a round number without having a document in front of me.

Q A round number is fine.

A Okay. Fresh market is a round number of 500 million pounds.

Q Okay.

A Processed market is about 250 million pounds.

Q Okay. And was the same ratio or the approximately same ratio true in 1994?

A I'm sure it was.

Q Okay.

A Very close probably.

Q Has the Council conducted any studies to [2-321] determine the price differentiation between the processed price and the fresh price?

A No.

Q Has the Council conducted any studies to determine whether or not an increase in the price of

fresh mushrooms will increase or decrease the price of the processed mushrooms?

A No, we haven't.

Q Now the 500 million pounds that you estimate—the 518 million pounds that you estimate for 1995, that does not include the production from producers who produce less than 500,000, correct, 500,000 pounds?

A It does not include that.

Q Now when was it that you began your "Blueprint for Profit" that you discussed yesterday? Respondent's Exhibit 72.

A Well, we started production of it early in the year of '95, but we sent it out and announced it about the middle of May.

Q Of 1994?

A 1995.

Q 1995. Okay.

A This year's program.

Q So it was sent out to the retailers in [2-322] approximately 1995? I mean in May of 1995?

A Yes.

Q Okay. And what was the cost of that project?

A The initial cost was $60,000 to produce all of the materials and get it to the producers and to the retailers.

Q Now was that $60,000 cost—did that include any firms that you hired to come up with that program?

A Yes.

Q Okay. And how much was paid to that firm if you can recall?

A Well, we used them for two or three projects all together.

Q Okay.

A I would estimate somewhere between a $7,000 and $10,000 consulting fee. It falls back into the 10 to 15 percent category that I talked about yesterday.

Q And did those originally just go out to the retailers or retailers and handlers?

A They were sent to the producers first—

Q Okay.

A —which includes handlers.

[2-323]

Q Okay. So they were sent to the producers and then there were more packages made and sent out to producers or retailers?

A To retailers.

Q Okay. And approximately how many were sent out?

A We have a 250 list for producers/handlers in the industry of people who are interested in getting our

materials. We have a 520 number list of retailers around the U.S., so I think that would be somewhere in excess of 750 kits.

Q Then there was—I think you testified that almost 70 more stores ordered more?

A Store groups.

Q Store groups. Representing about 15,000 stores?

A That's close. Yes.

Q And you said that there's approximately 30,000 stores in the United States?

A 30,000 supermarkets. I think there's 30,000-35,000 —somewhere in that area throughout the United States.

Q Okay. But that does not include—well, what's the opposite of store chains? You know, the mom and pop—

[2-324]

A The independents?

Q The independents. Does your 30,000 figure—does that include the independents?

A No, that does not include the independents.

Q Do you know approximately how many stores there are in the United States that carry produce?

A I'm not certain, but it would have to be at least 15,000 or more.

Q Okay. Now based upon this mailing in May of 1995, did you see any increased sales as a result of that promotional effort in May of 1995?

A We sent it out—it was late May by the time it reached the retailers. If anything had happened it would have happened in June. We do not receive our assessments until—for June until the end of July, so our last report would have probably been the one that might have reflected some increase or whatever. But I —to be honest with you I have not studied it.

Q Okay. So as you sit here today you don't know if that program increased consumption?

A No. Anything I'd say would be an assumption.

Q Does the Council keep track of the [2-325] prices?

A No.

Q The prices that fresh mushrooms are sold. Does the Council keep track of what price retailers are charging for the mushrooms?

A Only in the relatively small study that we're doing with six major retailers around the U.S. That's the only data gathering that we're doing at this time.

Q Now has the Council conducted any research or gotten a hold of any research showing the nutritional value of mushrooms?

A Yes. There was a study done several years ago about the nutritional values of mushrooms that was

approved by the FDA for use. In fact, you could use it on labeling.

Q Okay. And it's claimed, is it not, that there is no fat in mushrooms?

A Yes, that's correct.

Q And there is no cholesterol in mushrooms?

A That's correct.

Q There's no sodium in mushrooms?

A Correct. And you're allowed to declare that.

* * * * *

[2-327]

Q Okay. Is there any claims made by the Mushroom Council in its consumer educational program talking about whether mushrooms are healthy?

A Yes. Yes, I'm certain there are.

Q Are there any claims in your promotional material to consumers that mushrooms are nutritious?

A If there are it would be very, very minor as far as nutritious.

Q Why would it be very, very minor?

A Because it's a fact.

Q Because what?

A It's a fact. I've always said that what mushrooms —the best of what they have is what they don't have. They have very few calories. They have no sodium, no fat, and no cholesterol.

Q Besides the fact that they don't have the bad things, what you're saying is they really don't have the good things either?

A They have some, but it's—it's on a [2-328] minor level.

Q You're aware of the fact that there's a lot of produce in the market that a consumer can buy that is much more nutritious for the consumer?

A I'm not certain of that. I—I've only had experience with lettuce as far as fresh produce is concerned.

Q I believe you also testified that there was a research project that you entered into with—was it Rutgers?

A Yes.

Q Okay. And that was to see if you could get Bravo approved as a—or to keep Bravo approved as a pesticide or herbicide?

A It was done to do more research and establish more data so that—the hope would be that they could get a final registration on Bravo for use on mushrooms.

Q And it's a fact that Bravo is not allowed for use in California, isn't that correct?

A I'm not sure of that.

Q What is the greatest fresh mushroom producing region in the United States?

A Pennsylvania.

Q Okay. And approximately what percentage [2-329] of the fresh mushroom production is in Pennsylvania?

A According to the statistics we see from the government it's about 43 percent.

Q And California is second?

A Yes.

Q And approximately what percent is California?

A I think in the last number I saw it was 17 percent.

Q So you have approximately 60 percent of the mushrooms grown in two states?

A That's correct. Fresh mushrooms.

Q Now if I have these numbers correct, you have identified 152 mushroom producers that are subject to the assessments?

A That we have identified, yes.

Q Okay. You have so far on file 59 exemptions. 59 known producers for exemptions, because they produce less than a half a million pounds, correct?

A According to the applications they sent to us. Yes, that is correct.

Q Now has the Council done any work just to make sure that those people that have filed exemptions are producing less than a half a million pounds?

[2-330]

A At this point, no.

Q You believe though that there are some mushroom producers that you still haven't found?

A I'd say the possibility exists.

Q Okay. From what I learned yesterday from you there are 43 out of the 152 are producer and handlers, correct?

A That's correct.

Q And 16 that are handlers only?

A That's correct.

Q And if I understand that to mean it is that they market fresh mushrooms, but they grow none of their own?

A That's correct.

Q Now do you have any figures as to these 43 that are producers and handlers—how many of those 43 also purchase from other producers?

A No, I don't have that information.

Q Now is a company required to file exemptions with the Council if they are exporting fresh mushrooms?

A No.

* * * * *

[2-514]

Q Now in your opinion in being involved with agricultural products for the last 20 or so years, is there very much nutritional value to mushrooms?

A No, however I think by virtue of the fact that they don't contain—the things that they don't contain —mushrooms have value. And by that I mean mushrooms are low in sodium, low in fat, low in cholesterol, and they have some fiber, but they have a good story because they aren't harmful, and they're perceived to be good for you.

Q But mushrooms don't show up on any USDA pyramid charts as being promoted to be consumed by the American public on a weekly basis?

A No.

Q Then you are aware that there are many other vegetables that people can buy in the produce section that are much higher in nutritional value and still don't have the bad things—the fat and cholesterol?

A Yes.

[2-515]

Q And are a number of those vegetables that you can buy in the produce section that are much higher in nutritional value than mushrooms, are there some of those that don't have a mandatory promotional program?

A Yes.

* * * * *

[Testimony of Robyn Wilk]

[2-518]

Q Does the Mushroom Council to your knowledge have any information that any of the programs that have been completed in 1995 has increased the consumption of mushrooms?

A No.

Q Nothing that shows any increased sales in mushrooms?

A No. We're not in the business of sales.

Q I think on the public relations portion you said that there was approximately 850 newspapers that you sent this information to?

A Right. Correct.

Q And I do believe you stated that there's no assurances and there's no guarantees. Do you know how many ran your promotional material of the 850 you sent them to?

A Well, we have a press clipping service that sends back clips to us, which would suggest what kind of pickup we're getting. We subscribe to that [2-519] service through the use of our public relations agency.

At best a clipping service will tell you that they only can generate and hope to provide you about a 30 percent response in terms of what's really happening out there.

Q So this service that you subscribe to—did they give you any information as to how many of the 850 newspapers ran this promotional piece?

A No, not yet, and I expect that we'll have more of that information available at the end of the year when we have a year-end summary of our activities from the agency. We're not there yet.

Q Now one of the things that you mentioned, and I'm having difficulty understanding what it was—you said that all of the studies had been completed and they were reported at the July meeting. Which studies were those?

A Oh, excuse me.

Q I know you said it. I just didn't pick it up.

A Jim Degan, who again was the consultant the Mushroom Council retained to conduct the foodservice studies, reported on the findings of the two major studies that have been done subsequent to [2-520] the internal assessment, which was completed last Spring. Between Spring and the Board meeting at the end of July there were two additional studies completed, the pizza study and the distributor study—foodservice distributor study. Both of those studies were reported on at the July Board meeting in Chicago.

Q And one of those studies indicated that in 1990 there was a substantial downturn in the foodservice business? And then it picked back up again?

A Well, the foodservice industry has suffered like many other industries as a result of the economy. When people don't have as many available dollars to spend the foodservice industry suffers because that affects their pockets when people don't eat out as much.

Q And the Mushroom Council has determined that the foodservice industry is very important to fresh mushrooms?

A The producers and people within the Mushroom Council themselves, yes, have determined that they see that as a very—potentially a very—an active market currently, and one that they very much wish to pursue.

[2-521]

Q With pizza amounting to about 30 percent of the mushroom business for foodservice?

A No. I didn't say pizza. I said that the studies indicate that approximately 30 percent of their fresh production—they feel—goes into that whole area called foodservice, which would also encompass pizzas as one segment of it.

Q But do you recall that the foodservice industry had their downturn beginning in 1990 based upon one of the reports here?

A I don't have any recollection of that.

Q Now with respect to Exhibit 79, the Cyberspace where people send in recipes, and the winner will—or there maybe—is there just one winner?

A Three winners.

Q Three winners. And each would receive a $10,000 savings bond?

A No. That's the total.

Q Okay.

A Upon maturity.

Q Okay. And do you know how many recipes have been submitted as a result of that?

A I understand so far a couple of hundred. We still have till the end of September for the cutoff [2-522] date.

Q And I take it the Mushroom Council is putting up the entire $10,000 savings bond?

A That's correct.

Q The—Exhibit 81 is the magazine, the "Meals in Minutes"?

A Right.

Q And when did that come out?

A That came out in June of 1995.

Q Do you know in response to this June publication whether or not sales—fresh sales—of mushrooms in July were—did they have an increase?

A I have not heard any figures to reflect that.

* * * * *

UNITED STATES OF AMERICA

DEPARTMENT OF AGRICULTURE

HEARING

MPRCIA No. 95-1

IN RE: DONALD B. MILLS, INC.
A CALIFORNIA CORPORATION
D/B/A/ DBM MUSHROOM PETITIONER

VOLUME III

U. S. Tax Courtroom 2-1350
Federal Building
450 Golden Gate Avenue
San Francisco, California

Thursday
August 17, 1995

The hearing was convened, pursuant to adjournment, at 9:00 a.m.

BEFORE: EDWIN S. BERNSTEIN,
Administrative Law Judge

* * * * *

[3-592]

JOHN HALTOM

was called as a witness by the Petitioner and, having been first duly sworn, was examined and testified as follows:

JUDGE BERNSTEIN: Please state your full name and address.

THE WITNESS: John Haltom, H-a-l-t-o-m, [3-593] 3701 Brownsville Highway, Jackson, Tennessee 38301.

JUDGE BERNSTEIN: Thank you.

MR. LEIGHTON: Good morning, Mr. Haltom.

THE WITNESS: Good morning.

DIRECT EXAMINATION

BY MR. LEIGHTON:

Q What is your current position?

A My current position is I am President of Pictsweet Mushroom Farms, which is an operating division of the United Foods, Inc.

Q Does the court reporter have this down? Could you spell Pictsweet?

A She has my business card.

Q Okay. And then for the court, then?

A P-i-c-t-s-w-e-e-t.

JUDGE BERNSTEIN: Thank you.

BY MR. LEIGHTON:

Q And how long have you occupied that position with Pictsweet?

A Since October of 1991.

Q And has your position changed any time during that period of time?

A No, it has not.

Q And, prior to being the president of Pictsweet, what was your position?

[3-594]

A I was Director of Inventory Planning and Distribution for Pictsweet Frozen Foods.

Q And how is Pictsweet Frozen Foods connected with United Foods?

A Pictsweet Frozen Foods is an operating division of United Foods, just as Pictsweet Mushroom Farms is.

Q And how long has Pictsweet Frozen Foods been in business?

A Pictsweet Frozen Foods started 50 years ago, 1945, as a strawberry processor with a single-plant operation in Bells, Tennessee.

Q And how has Pictsweet grown since then?

A Well, it started out just freezing one single product, strawberries, and selling them to wholesalers for distribution to drug stores like Walgreen's, when Walgreen's had a soda fountain. It's progressed from that point to its current size today.

Q And approximately how many different foods does Pictsweet distribute?

A Pictsweet Frozen Foods is only in the frozen vegetable business and it has thousands of stock-keeping units. And it is a vegetable product that is to be frozen, its product line, from asparagus to zucchini.

[3-595]

Q And there are how many SKUs?

A Thousands, 3000.

JUDGE BERNSTEIN: What's an SKU?

THE WITNESS: Stock-keeping unit.

JUDGE BERNSTEIN: Thank you.

BY MR. LEIGHTON:

Q And that's how you keep track of what you have in inventory and what you sell?

A On the frozen food side.

Q Now does Pictsweet have something other than frozen foods?

A Pictsweet Mushroom Farms.

Q Okay. How long has Pictsweet Mushroom Farms been in existence?

A Since October of 1987.

Q And how long were you with—when did you start with United Foods?

A 1976. So next year will be 20 years.

Q Now you stated that your position was with United Foods; what were your job responsibilities?

A With Pictsweet Frozen Foods?

Q Yes.

A Started out as a transportation analyst in the Distribution Department and wound up [3-596] responsible for total distribution of all frozen foods, buying all components that the company did not produce in their own plants, procurement of all packing materials and other sundry items, planning inventory, scheduling production, customer service.

Q Now could you state what your job responsibilities are with respect to your fresh mushroom division?

A Our mushroom is structured as three separate business units. We have a mushroom farm in Ventura, California; we have a mushroom farm in Salem, Oregon; and we have a mushroom farm in Fillmore, Utah.

Each mushroom farm is a separate business entity and each farm has a general manager. And the general manager has a staff that allows him to perform all the duties that any independent business would have to perform. Each farm is a profit center.

And my responsibilities are to give those three farms direction, to motivate them, to hire good people, to measure their results, and stay out of their way.

Q Now other than with respect to each of those separate farm entities, what else is your job position with Pictsweet?

A We're an operating division. I have [3-597] profit and loss responsibility for Pictsweet Mushroom Farms. I report to the Board, I report to the President, and I make quarterly reports to our Board of Directors.

Q Now what is your educational background?

A I have a bachelors degree from the University of Tennessee, Knoxville, and I've done graduate work at Georgia State University.

Q And in what area of education?

A Transportation and marketing.

Q What is the most profitable food product sold by Pictsweet?

A On a per-pound basis?

Q Yes.

A Mushrooms.

Q Mushrooms?

A Mushrooms, without a doubt; the category mushrooms would be our most profitable item.

MR. LEIGHTON: When I ask you questions, if you find that it is too proprietary to answer, please let me know so we—

THE WITNESS: Sure.

MR. LEIGHTON: I do not want to ask you any proprietary information that you don't want to provide.

[3-598]

THE WITNESS: Sure.

BY MR. LEIGHTON:

Q But approximately what percent of Pictsweet's business is mushrooms?

A Twenty-five percent.

Q And what percentage of Pictsweet's mushrooms are sold fresh?

A Fresh market is difficult to measure because, when you market mushrooms, you have to market the total crop. Our largest customer is a manufacturer of a meat substitute where mushrooms would be the primary ingredient in that meat substitute. We sell that one account, that one customer, one ship-to location, over 100,000 pounds a week. That's processed.

We, in total, sell about 50 percent of our total volume to retailers and the other 50 percent goes to processors such as the meat substitute manufacturer. We also have the ability on certain days of the week, because it must be marketed and sold daily—mushrooms must be marketed and sold daily—of

having to, at times, go to the processor of what I call last resort.

Mr. Reitnauer is a processor; his company's a processor. They post a price. If you . . . .

* * * * *

[3-600]

mismanaged. The owners had some personal legal problems, financial difficulty. They didn't own this business very long and, when we bought it, it was in bankruptcy and the facilities had been run down and mismanaged. In fact, the customer base was basically gone.

When a product company or mushroom farm physically goes out of business, those customers have to go somewhere else to buy their mushrooms. When you go back in business, you have to rebuild that credibility, you have to rebuild that reliability and that trust. And it's almost—sometimes I think it takes generations to completely erase such bad experiences as happened to our customer base.

We've been fortunate enough that we've been able to overcome it completely and have been doing quite well in the mushroom business from the first month. We were profitable the first month and we've been profitable since then every quarter.

Q So they bought these mushroom farms in 1987, you began being in charge of that mushroom business in 1991?

A Uh-huh—yes.

Q Have your sales increased every year since then?

[3-601]

A Yes, they have. Since 1991—I might add, since 1991, our business is up 25 percent in pounds. So our prices are higher, our revenues are higher, and our profit since 1991 has more than doubled.

Q You heard Mr. Moss testify the day before yesterday there was a decline in consumption from 1990 to 1993. Did Pictsweet feel that?

A In the markets that we serve—you must understand that we don't sell to a national market, we sell to regional markets. You can't ship mushrooms long distances, they have a very short shelf-life. The more they're handled, the more they bruise, and the quality is reduced substantially after the pick.

Our markets have shown continued growth, individually and collectively. Now there are blips in that; the Los Angeles market has been a tough market, you've had natural disasters, you had riots, you had a recession, you had defense industry cutbacks. I mean, that's been a tough market.

Q You had an earthquake down there, too.

A Earthquake, I think it's a natural disaster.

Q Could you describe, and perhaps in the following order, how mushrooms are grown, marketed,

* * * * *

[3-606]

A Well, they don't insist on it because they can get it from everyone else. But, because we can provide it, what the retailer can do is order this morning and then revise his order before noon in order for us to get it on the truck to deliver in the evening. So we allow—we provide the service to the retailer that they can fine-tune their inventory every day to match their sales requirements at their stores.

Q Now, if a mushroom is picked today in Ventura, delivered to an L.A. supermarket today, is it on the shelf by tomorrow usually?

A Usually on the shelf by tomorrow; that's right.

Q Your retailers that you deal with, how long will they allow product to sit on the shelf that hasn't sold?

A It's not how long they will allow it, it's what will the product look like. And they will take some action after a certain period of time—they've got several options. One is, they reduce the price on their own to move it. Or they will throw it in the trash.

Now the fact that we're there every day reduces their shrink; and their shrink is what they throw in the trash.

[3-607]

Now they told me that mushrooms have about seven percent shrink. Now the retailer eats the shrink. Anything we can do to reduce that shrink increases their margins, provides a better quality product, and cements the relationship that we have with that buyer and with that chain.

Q And is part of the reason why you want to provide that same-day service is the fact that the customer can buy a smaller amount, knowing he can buy another amount the next day?

A That's right.

Q So he doesn't have the shrink and it looks like it's one- or two-day-old mushrooms?

A And doesn't have the inventory investment, which is very important. Inventory turns are a critical measurement of buyers of any item at retail but, for these buyers, about the same token.

Q Okay, can you explain that inventory turn?

A Well, how much inventory do they sell—I mean how much product do they sell and how many pounds do they have in inventory. If they are turning inventory every day, they would get 365 turns per year. If they turn it once a week, they get 52 turns per year. Obviously, the more turns the less [3-608] investment they have at any point in time.

Q Does Pictsweet have its own transportation?

A We sure do. The drivers are an integral part of the service factor. We own our own trucks, the drivers are employees. And the drivers are like every other employee in every one of our farms, they are sharing in the profit. Twenty percent of the profits are distributed to the employees every quarter So the drivers have a vested interest in, not only their jobs, but their quarterly bonus. And their quarterly bonus has been in double-digit percentages on some quarters.

It's been very much part of our service and marketing factor is to have these drivers, as well as the other employees, dedicated to providing the best level of service every day, every week, every month.

Q Does Pictsweet sell any mushrooms east of the Rockies?

A No, we can't transport mushrooms all distances; no one can very well for two reasons. One is the quality, the shelf life. Long transit times increases the bruising, it also costs more money.

Mushrooms have a density factor. You [3-609] take a 45- or 48-foot refrigerated trailer, which is what most of the over-the-road trailers are, 22,000 pounds, as opposed to frozen vegetables at 45,000 pounds. So your transportation costs on a per-pound basis are very high.

Q Since you got into the business in 1991, has the cost of production of mushrooms per square foot decreased?

A Well, I can only speak for—

Q Okay.

A And ours has dropped dramatically. There's several reasons for it. Yield is the primary driving force behind the cost. You have the same input cost and the more you get out of those inputs, the less your cost per pound is.

If you get three pounds per square foot, or you get six pounds per square foot, the only difference is picking and packing, everything else is the same. Also, our costs are down dramatically because our profit-

sharing program has reduced our Workmens' Compensation expenses, Workers' Compensation expenses.

That's been a very big problem in California and we have been able to focus our employees on the fact that they have a vested interest [3-610] in helping us provide a safer workplace. So the combination of those factors have driven our costs down dramatically.

I don't know if everyone else can say that or not. If they can't, they are missing a great opportunity.

Q During the time that you've been in business, have better varieties come out?

A Yes, the strains; the spawn-makers are working to provide spawn that has higher yields and better quality. But they can only do so much and, once they deliver that spawn, then the grower has to take that spawn and, with good management and growing techniques, take it the rest of the way.

Q Do you believe, over the four-plus years that you've been there, that the quality has increased?

A The quality definitely increased. As we've invested in our farms, we've invested in those things which improve quality, air-handling capability, cooling capability, transportation capability.

Q Have you found that that increased quality causes retailers to pay more money and buy more product?

A It's caused retailers to be pleased with [3-611] the service we provide, the quality we provide, and it's been good for the consumer.

Q You touched on it a little bit, the one that makes that vegetarian burger, but could you describe the types of markets serviced by Pictsweet in the fresh market?

A We get to market total crops. And, when our harvesters are in the growing rooms picking, they make on-the-spot determinations of size and of quality, large and mediums—I'm sorry—jumbo and large, medium and small, and then No. 2 product. So you've got a range of quality right off the beds that you have to deal with.

And then, when you go through the packing process, it's also a sorting process, and you accumulate more product that is what we refer to as No. 2. That's not a USDA number, that's our—that's an industry standard but it's not USDA-driven. So you have to deal with that entire product.

Our predominant market is the retail market and it's that way because we've got Pictsweet frozen foods in the frozen vegetable cabinet, we've got Pictsweet mushrooms in the produce cabinet, we can do cross-merchandising between the two. We do—the wholesale market is a good market for us. The [3-612] foodservice figures is a good market for us. The process market, for those who are taking the mushrooms and commercially cooking or freezing or brining or—that's a good market for us.

Now, it's not a good market for us if we have to go to the mushroom use of last resort.

Q When you're talking about these other process markets, you're not talking about the 35-cents-a-pound stuff that Mr. Cirini was talking about?

A Only the last resort.

Q Okay. The other process market that you're talking about was—describe that again, the ones that are freezing, cooking?

A Well, we have a customer—I mentioned it earlier, I go back to that one—we have a customer in the northwest who takes mushrooms and makes a meat substitute and that meat substitute can be a burger, it can be taco mix, it can be sausage; they change the seasonings but it's basically our mushrooms, brown-rice, onions, and spices.

They are very successful. It's extremely successful and we're going with them. They want to triple their business in the next three years and they want us to tell them next week how we're going to supply them with three times the amount of mushrooms

* * * * *

[3-615]

— he's not going to do it.

BY MR. LEIGHTON:

Q Can you describe what Pictsweet does to help Pictsweet increase sales?

A That's our business, increase sales.

Q Whether we call it advertising, promotion, whatever, whatever you do to help Pictsweet sell more product.

A Demand—we want to increase the amount of pounds that we sell and increase the amount of revenue that we receive for those pounds.

Well, it's an all-inclusive process. I don't know how you say that it's just this and just this and just this. It includes everything we do.

We preach two things to our employees: Take care of the crop and take care of the customer. That's why we have an incentive program at the farm, that's why the profits are shared, that's why we control our transportation, that's why we have a direct sales force—we don't have brokers, we have a direct sales force. That's why the customers talk directly to our sales force, they don't talk to a third party, they don't talk to intermediaries, they talk directly to our sales force. That's why we're structured as individual business units and not one [3-616] large mushroom growing entity, but three separate mushroom growing entities.

That's why we deliver every day of the week; that's why we'll deliver twice to some markets that the markets require, like Fridays in Los Angeles, we'll make two deliveries a week—a day.

We work with the retailer, we work with the wholesaler, we structure a marketing and merchandising plan for each individual customer. No two customers are alike. Some retailers have an every-day low price strategy, some have a promotion program. If

they have a promotion program, we give them rotating programs, cents-off.

I believe Reitnauer yesterday called it off-invoice allowances. Well, we—it's a price reduction, that's all it is. We do all of that. We provide promotional material, we provide point-of-sale materials, we provide paper bags because mushrooms are stored—the shelf life is longer if they're stored in a—hold them in the refrigerator in a paper bag rather than the plastic roll that's at the supermarket.

There's many ways to promote the sales and increase the volume.

Q Now the promotional material that you [3-617] provide to the retailer, is that promotional material that Pictsweet paid for?

A Well, we've had our promotion material since we've been in business. And we try to keep it updated all the time.

Q So you provide promotional material to them; correct? You give them price discounts when those types of stores that want to go on sale want to go on sale.

A Right.

Q Do you do any like joint advertising with them?

A Well, we do provide money for best-food-day ads so that our brand name is in the ad. Yes, we do that.

Q And you pay a portion of the cost of that ad; correct?

A That's right.

Q Do you also, as part of your promotions, rotate the types of mushrooms sold?

A Sure. Sure, we—if a customer—if a chain store has a promotion program and not an everyday old price program, you'll see their ad on Wednesdays or Thursdays in the newspaper. It's called best-food-day. Some markets, it's on Wednesday and [3-618] some markets, it's on Thursdays.

We pay a fee to have mushrooms in that ad. Now, if we have a hundred percent of that customer's business, we have our brand name in that ad. If we share that business, we don't.

Now, you don't have a lot of customers sharing accounts. Most of our retailers—let me go back. All of our retailers, we either have a hundred percent of the business or we share that business with one other grower.

Now, that other grower may have a minority position or a majority position or we may share equally. But there's not an undetermined number of mushroom growers servicing retail accounts in Phoenix and Los Angeles and Denver and Salt Lake City and Boise and Portland and Seattle. Now I can't speak for the rest of the country and I don't pretend to because we're not national, we're regional.

Q What are some of the other product differentiations that you make to help promotions?

A Well, we promote different items. We don't promote eight-ounce button mushrooms every rotation. We might do sliced and we might do stuffers.

Q What are stuffers?

[3-619]

A Stuffers are jumbo mushrooms; you turn the cap over and you put something in there that's probably not really good for you, like cheese or some fattening item, because you don't have any fat in the mushroom so most people will take something that is fat and add it to it. But it's a holiday item so it sells very well seasonally.

Now, two things I heard yesterday I think I need to make sure that I set the record straight from my perspective.

It is seasonal; there is a seasonality. And the reason it's seasonal is, sales are driven by shelf space and, during the times of the year when you've got local produce, local cherries, local apples, local green beans, there's a lot of items competing for a definite amount of linear feet.

Now mushrooms get squeezed in, get squeezed out because, you know, we're there every day, we're there every month. So the retailer depends on us in our market to be almost accordion-like, we can expand or we can contract. We want the most shelf space that we can get because it's proven that the more linear feet you have, the more attention you're going to get, the more likely it is that a shopper is going to stop in front of your mushroom section and [3-620] look and buy.

Because it is an impulse item. It looks good, it's fresh, attractive price, perceived good value built in the product.

The other thing is, you sell more when it's on promotion and it does not have a negative impact on the following week. And the reason that is, it's just common sense, you have a definite shelf life, if you buy two packages this week because they are on a reduced price, if you want mushrooms next week, you better not go back to the refrigerator and try to use those mushrooms that you purchased last week. They won't look good, you won't think they taste good, you might even think they don't smell good. So the next week, if you want mushrooms, you've got to buy them again.

So, if you had a promotion program in place and we do on a regular basis, rotating ads, you're going to sell more in a given time and it's not going to have a one-for-one impact on future sales.

Q So you disagree with same of the testimony yesterday?

A Those two items are right in my mind, seasonality—it is seasonal. Holiday time, we couldn't sell enough, we couldn't have enough mushrooms on hand to service our customers during [3-621] Thanksgiving week and Christmas week. We always run out.

Q In the fresh mushroom industry, approximately what size is Pictsweet?

A I suspect that, total pounds grown, we're third. I suspect we're third.

Q Is that overall mushroom industry?

A I would guess. Campbell is—well Campbell's representative said they were the largest. Monterey says they're the largest. I won't argue, they're the largest two and we're happy to be third.

Q But there are certain periods of the year that you can't produce enough?

A No. No, no, no, no. The holiday time is a time of special meals and mushrooms provide a special element for that meal, they enhance the meal. It's also a time when people who might be marginally attracted to mushrooms but think they are out of their price range, they'll splurge at holiday time. You know, it's Christmas, it's Thanksgiving, they'll do it because of that.

Q And have you found that, when you have done these promotional pieces, whether it's a price discount or going on ad, that consumption of mushrooms increases?

[3-622]

A Definitely, without a doubt.

Q And do you believe that it does not decrease consumption, then, the following week?

A Those mushrooms which are purchased on ad, the additional quantities that are purchased because of the price being offered to the consumer, will not replace nor substitute the following week's purchases. If they are going to purchase the following week, they cannot displace that purchase with inventory on hand in their refrigerator.

Q Now is that just your opinion or have you spoken with the retailers?

A That's our retailers' belief.

I believe that, our retailers tell us that, our statistics show that. Our relation with our retailers is excellent; if it wasn't, we wouldn't be their primary source of mushrooms.

Q Do you also provide recipes?

A Sure.

Q Okay, and that's at your cost?

A Sure.

Q Do you do in-store promotions?

A In-store promotions, you mean—

Q Well, in-store demonstrations?

A Right, we do.

[3-623]

Q And have you found in-store demonstrations—do you believe that that increases the number of consumers that buy mushrooms?

A And I guess I could possibly agree and disagree with Jack Reitnauer yesterday. There's two reasons to do these in-store demos, I think. One, your retailer encourages you to do it and, two, the people you reach there, it's the best opportunity to reach those that don't

use mushrooms on a regular basis or maybe don't even use them at all.

You can entice people to try something that they've never tried before if you're giving it to them free. That's just human nature. So we do that on a systematic basis.

Now it's not going to give you this quarter's results, it's going to give you a long-term benefit, it's going to cement your relationship with the retailer, and it's going to provide those shoppers who maybe wouldn't spend $2.00 for a pound, they might even take your sample, and when we do that we also give them a recipe that they can try, and maybe even a coupon for 25 cents off their first purchase.

Q So, when someone tries one of your mushrooms in the store, tries one of the mushrooms during the demonstration, you may give them a coupon [3-624] for like 25 cents off?

A Right.

Q Does Pictsweet keep track of the redemption rate?

A Right, we do. There's a clearing house for coupons. You know, coupons, every Sunday you can use, like when you've got a sheet of coupons. I read where the big national companies say that two or three percent redemption rate is good.

But, when you hand that coupon to a customer, a potential customer or a current customer, in the store or at a food show—you know, most of the big chains have annual food shows, most of the big cities, most of

the wholesalers, they have food shows and they have thousands of people come to these food shows and we always participate in those—and hand coupons out and hand recipes out, you hand free food out, these coupons come back to us 10, 15 percent.

Now, that's not a hundred percent, that's a long hundred percent, but it's five, six, seven times the annual redemption rate on Kellogg's Corn Flakes. That's what I read and that's only what I know.

Q Now all of these things that you have described as to what you do to promote and increase [3-625] the consumption of mushrooms, does that cost Pictsweet money?

A Sure.

Q Do you believe, as President of Pictsweet, that Pictsweet knows best how to survey the customer?

A Sure.

Q Do you believe that Pictsweet knows best how to increase the consumption of mushrooms with your retailer?

A Oh, most definitely.

MR. LEIGHTON: Your Honor, may I approach the witness, please?

JUDGE BERNSTEIN: Yes.

MR. LEIGHTON: I would like to show you what's been marked as PX No. 7.

(Whereupon, Petitioner's Exhibit No. PX-7 was marked for identification.)

JUDGE BERNSTEIN: I think I have copies of—I had copies of 7.

MR. LEIGHTON: No, this is a brand new one.

JUDGE BERNSTEIN: Okay. You had . . . .

* * * * *

[3-632]

where they squeeze the section down and it's a rifle approach; you can't shotgun it, you've got to rifle it, not only with the chains but with the individual stores. It has to be a rifle approach, rifle merchandizing not shotgun merchandizing.

Retailers are very knowledgeable about their business.

Q Have the Pictsweet's marketing efforts changed since the formation of the Mushroom Council?

A No. No, we couldn't afford a change and I don't think anyone's changed their marketing efforts. We have to keep focused in moving product.

Q Is that what your retailers expect?

A I don't think they'd allow us to do anything else.

Q Have you spent any less money on your marketing efforts since the Mushroom Council was formed?

A Only the assessment. Our own direct efforts have not changed.

Q You would do that anyway?

A Certainly.

Q So the only cost increase is the assessment

A That's right.

[3-633]

Q What is Pictsweet's position with respect to the attempt to put together the Mushroom Council?

A Well, we were a forthright, obvious from the very get-go opponent of it. We didn't think it would work in this industry; and we still don't. But we certainly have—I've certainly used my talents, as meager as they may be at times, to fully support the Council; and I think everyone would agree with that. I've served—

Q You still don't believe it will work?

A I don't believe it will work in an industry such as fresh mushrooms where it's a regional business. Each market is different, you have to focus on that market and you can't use the same techniques in every market. It's a regional business.

Q Before we get into that again, let's get back to your opposition. Did you talk to USDA about how you opposed it?

A Yes, we did. We were open, and we still are; we're forthright; and we lost in referendum.

Q Did you testify in Congress?

A Yes.

Q Who was the proponent of the—what Congressman was the proponent of this Council?

A I don't think I know that.

[3-634]

Q Was he from Pennsylvania?

A I think so but I can't call his name. I know he was from Pennsylvania; I can't call his name.

Q Is Pennsylvania the biggest mushroom-producing state?

A The USDA statistics, 47 percent of all the pounds grown in the U.S. are grown in Pennsylvania and predominantly in eastern Pennsylvania.

Q Are they fighting over a lot more markets than what you're fighting for out here on the west coast?

A Obviously, obviously. They've got 47 percent of 750 million pounds, they have to struggle. I'm sure they have to struggle. I can't identify with them because I'm not there, never have been there, never participated in that market.

Q And California is what percent?

A Seventeen percent of the national. So you've got 47 and 17, that's two-thirds, I guess.

But that 17 percent is skewed toward the Bay Area. There's one or two farms in San Diego County, we're in Ventura County, I can't think of another farm until you get to the San Jose area.

Q What about east from L.A.? You service Phoenix; do you know if anybody else services Phoenix?

[3-635]

A Monterey services Phoenix and ourselves, that's the only two.

Q Does anybody else service Denver?

A There's a farm in southern Colorado who has serviced the Denver market; it's their primary market. We service it from Fillmore, Utah, and Monterey services it from the Watsonville and Morgan Hill, California farms.

Q Do you service San Francisco at all?

A No, we don't.

Q That's how regional it is. You have a farm a few hundred miles away but you do not service San Francisco.

You testified in opposition to the program in Congress?

A Uh-huh—yes, I did.

Q Was it just your position or was there a body of people that—United or Pictsweet—that agreed with you?

A Well, it was our company's position, it's my personal position and it was our company's position. And although we were obviously the open opponent, 35 percent of the growers voted in opposition to the program.

Q Now you lost in the referendum; correct?

[3-636]

A Right, we did.

Q And did United go so far as to attempt to get a list of the producers to lobby the producers?

A Yes, we did.

Q Did USDA give you a list of the producers?

A No, they did not.

MR. COOPER: We're getting into—

JUDGE BERNSTEIN: We're getting into an area that we agreed would not be relevant to this proceeding.

MR. LEIGHTON: We're just talking about the support in the industry, Your Honor.

JUDGE BERNSTEIN: I don't want any further into what happened in the course of the referendum.

MR. COOPER: I'd like to have that last question and response struck. It's irrelevant to this proceeding and I don't think it's completely accurate. And I don't see a need to explore it on our examination to straighten out something that isn't relevant.

JUDGE BERNSTEIN: We're not going to go any further into this—

MR. LEIGHTON: That's right -

[3-637]

JUDGE BERNSTEIN:—in terms of—

MR. LEIGHTON: That is correct.

JUDGE BERNSTEIN: Okay.

MR. COOPER: So the court, therefore, is not striking the answer.

JUDGE BERNSTEIN: I don't recall the question.

MR. COOPER: He said the USDA would not supply a list, I believe, and I think our position is somewhat contrary.

JUDGE BERNSTEIN: I don't find that to be relevant to the issues of this case. Whether or not they supplied a list is, in my mind, irrelevant.

MR. LEIGHTON: Your Honor, I think it's marginally relevant for the following reason: Is that USDA, in response to these petitions and in briefs and stuff like that, they talk about the fact that how, you know, the program had the overwhelming support of

growers and things like that. And they will announce that they had 65 percent in this referendum.

The 9th Circuit Court of Appeals, in another Cal Almond decision when Cal Almond attempted to get the list of growers of almonds and USDA refused to provide it, and the program—the suit went up to the 9th Circuit Court of Appeals and the 9th Circuit [3-638] Court of Appeals said the First Amendment required that the list be provided to allow people, proponents and opponents in the industry, to lobby against the legislation just like you would have if there was referendum.

So I want the record to be clear, when USDA purports to talk about how many people supported the program, that USDA refused to provide the list of producers so people could lobby the producers and tell them what's going on.

MR. COOPER: Well, quite the contrary, we did offer the list eventually and they refused to take it because of pending litigation I assume they had against the Department.

JUDGE BERNSTEIN: It was my understanding that this would not be an issue and you've taken issues related to the vote from your petition. Therefore, I would consider this to be undue surprise to introduce this issue into evidence.

MR. LEIGHTON: Okay. I'm just stating my position for the record.

JUDGE BERNSTEIN: Okay.

MR. LEIGHTON: So, we'll move on.

BY MR. LEIGHTON:

Q Now the referendum passed and what was [3-639] Pictsweet's position with respect to the Mushroom Council at that point?

A Well, by securing a position on the Council so that we could be involved in the process, so that we could protect our investment, so that we could make sure that the Council was accountable for their action.

Q So did you run for the Council, or however that happens?

A The process, basically, is I was nominated for a position. Two producers were nominated for each position in open regional meetings and then, from the two that were nominated, the Secretary of Agriculture selected one of the two. And I was selected to represent the Western Region.

Q And who was the other nominee, or what entity?

A Monterey Mushrooms.

Q And, at the time the legislation went through and the time the Council was formed, was there any crisis in the fresh mushroom industry.

A We didn't think there was a crisis. We were excited to be in the business, still are.

Q Were a bunch of growers going out of business?

[3-640]

A I don't know. If those growers couldn't keep up with the advances in yields and reduction in cost, I'm

sure they were getting left in the dust. But a lot of growers are in business and there's a lot of people who are happy to be in this business.

Q Was Pictsweet making money in 1992 and 1993?

A 1991 was the most profitable year in a series of increasingly profitable years since we started. And since then, the years have been increasingly profitable; and 1994 was just as profitable.

Q Now what did you do as a result of your appointment to the Board by the Secretary of Agriculture?

A Well, I adhered to the duties of Council members. I was elected Treasurer of the Council at the first meeting in Washington, I was chosen of one of three to serve as a selection recruitment committee for securing the President/CEO's position. I secured a line of credit for the Council for their operating expenses up and until the time that the assessments starting flowing.

Q Was that something Pictsweet did on its own?

[3-641]

A Yes.

Q Pictsweet secured the line of credit for the Mushroom Council?

A From my bank, a line.

We prepared the financial statements on a monthly basis for the first month until the Sacramento office was opened and a local accounting firm was hired. A period of months, I can't tell you how many months.

Q Did you do that for free?

A Sure, yeah.

I have attended all but two meetings and I've shown up at the appointed hour and I've stayed until the very end. I've been as supportive as I possibly could have been.

I think I called the President/CEO, Mr. Whitfield, on a periodic basis; I've offered to help him any way I could. I offered my personal support to steer ideas that he thought were beneficial through the political process. I think I've done as much as I possibly could and I think I've done more than some others have done.

You know, some of the Council members don't seem to be as interested as I am and they were for it. They don't come to all the meetings. They [3-642] have their own reasons, I'm sure.

Q Now these meetings are held all over the country; aren't they?

A Yes.

Q So it's not a simple thing to go to a meeting.

A No, it's not for me. We have the meetings in all geographic areas but we've had a preponderance of the meetings in Sacramento, which I support because that's our headquarters. So Sacramento is not a direct flight for me. So the travel arrangements have to be planned in advance; and they ought to be in advance.

Q Now you have been with the Council and on the Council and a competitor in the industry since the Council was formed. Do you think the Mushroom Council can do a better job with your assessment dollars than you can?

A No. No.

Q And is part of that opinion based upon what you've seen them do?

A Well, you heard testimony this week that the results of the council activities haven't increased consumption or increased—

MR. COOPER: Objection, Your Honor—I'm [3-643] sorry.

THE WITNESS: I agree with that; there's is no measurable improvement or no—there's no measurement to what's been done, no impact.

BY MR. LEIGHTON:

Q And based upon what has been done, do you think there's any effective way to even measure that?

A That's very difficult. I know all the strategic plans, and we have a measurement of the program—an evaluation of the program, and it's one thing to say that you have a plan and you execute the plan; it's another thing to say that the plan resulted in increased consumption.

Now the—and I was very happy with this, I was very pleased—at the very first meeting we had, there was a unanimous agreement that we would measure the

Council's performance on per capita consumption. And, if it did not go up, the Council had failed. And the five-year plan is to go from 1.9 pounds per capita to 2.1 pounds per capita.

Well, that sounded real good. I have to admit, I thought that was great, if we could do that that would be great. I just got—I overlooked one factor there and that is that we were already at two pounds based on USDA's numbers. I should have caught [3-644] that; we all should have caught that.

We're an instrumentality of the USDA and the USDA say that it was two pounds. Well, one-tenth of a pound may not seem like much but you're only talking about two-tenths of a pound. So we've already achieved half our goal before we even went into business in 1993 because 1992 consumption was two pounds. I just blew it; we all blew it. We should have seen that.

But we are unanimous that it will only be successful if we increase consumption, per capita consumption.

Q Per capita consumption. Your firm is increasing sales; correct?

A That's our job.

Q And you have done that?

A And we've done that.

JUDGE BERNSTEIN: Let's take a recess, we will recess for ten minutes.

(Whereupon, a brief recess was taken.)

JUDGE BERNSTEIN: The hearing is back in session.

BY MR. LEIGHTON:

Q I understand the first big program that the Mushroom Council began was the Valentine's program [3-645] purporting mushrooms to be aphrodisiacs; is that correct?

A That's right.

Q Did you vote for that program?

A No.

Q Why didn't you vote for that program?

A Well, there's several reasons. I think Mr. Whitfield yesterday said that it was because of it being an interim program; and he's right. It was an interim program before we had a long-term strategy.

And he had voiced his position that he didn't think that an interim program that didn't have a long-term strategy would be successful or be meaningful.

And I thought the term "purporting it to be an aphrodisiac" was in poor taste. And it was.

Q Did Pictsweet want to be associated with that message?

A No. No.

I asked the Council to reflect in the minutes that I was opposed to it and why.

MR. LEIGHTON: May I approach the witness, Your Honor?

JUDGE BERNSTEIN: You may.

MR. COOPER: This is a letter from—

[3-646]

(Whereupon, Petitioner's Exhibit No. PX-6 was marked for identification.)

BY MR. LEIGHTON:

Q Mr. Haltom, is this a letter you wrote to Mr. Whitfield with respect to that Valentine's Day 1994 program?

A It is.

Q Another program that they had was the "Blueprint for Profits"?

A Right.

Q And did you vote in favor of that program?

A I did.

Q And did you have any concerns that it wouldn't work?

A Well, it was not something that was—it was not really a new program, it was a restatement of some very well-known, well thought of practices for merchandising fresh mushrooms. It was a schematic diagram. Mostly retailers, given their dictates, given

what, they need to do, they will try; they are interested in doing things like this.

This has been an evolving program by [3-647] mushroom producers and I think, this was an attempt by the Council to bring it all together.

Q Did you find many of your retailers already did things similar to that?

A Yes, I did. And the ones that didn't, I can't tell you today that they've done anything different because of the blueprint that we gave them. I think they should but they've got a lot of other pressures.

One of the pressures they have is all the proliferation of pre-packed salads and they take a lot of shelf space. So they've got their own concerns, they've got their own requirements. And what we told them, what the Council said for them to do would be good for the mushroom industry, but it's a store-by-store, chain-by-chain business decision.

Q Now has Pictsweet worked with retailers prior to the formation of the Commission as how to package the product, how to display it and those types of things?

A I'm sure all growers have; it's just part of the business, everyday business.

Q Now this "Blueprint for Success" and how to operate that, is that the only way to be able to display mushrooms and market mushrooms?

[3-648]

A No, no. There's many ways to do it. This is one way and it's a good way.

Q Now, as a result of that project, did you find sales increased?

A We couldn't measure the benefit of it.

Q Did any of your retailers think or tell you that they thought sales had increased?

A They have not told me.

Q Now do you recall any other programs that you know were approved by the Council?

A We've done a lot of research—the Council's done some research trying to establish the baseline so that the program can be measured in future years at to its success.

Q What about some of the other promotional programs that—

A The public relations activities?

Q Yes, that Robyn Wilk testified to yesterday.

A I think, you know, Robyn expressed herself extremely well. She has done a tremendous job of getting the message out. You know, it's confusing to me and it's confusing to every one, if you measure the exposure, what does that translate into sales volume? She's done a great job. I mean, she speaks [3-649] well, she's knowledgeable, and she'd done a good job. The PR campaign is moving forward.

I don't know if it will work. It makes you feel good because you look in the paper and you see the product that you sell and it does make you feel good. But I don't know if it's going to work.

Q Have you seen any results of it yet?

A We haven't been able to measure the impact on our business.

Q Do you believe that $1.5 million budget can influence the national market?

A It doesn't seem like it would be enough.

Experts before me—and I'm certainly not an expert—they say it's not enough. We don't conduct a national campaign so I wouldn't know. It seems to be meager.

Q And, for example, like you have a big portion of the L.A. region, you have a big portion of the Portland and Seattle, Denver, Utah, Phoenix regions.

A Right.

Q Is a regional program in New York going to do anything for you?

A Nothing.

Q Is a regional program in L.A. going to do [3-650] anything for the Pennsylvania growers?

A Nothing.

Q And is that the way throughout the market in the United States?

A Obviously so. It may help Campbell. They said they like to think of themselves as national because they're where the people are. It may help Monterey because they have farms in Tennessee and Texas. And, you know, they are semi-national. But it won't help the other 157 or how many growers there are. I don't guess anybody knows exactly. I don't know exactly.

Q Have you been involved in the Council meetings when it's come time to vote on the budgets and determine the assessments?

A Oh, sure, every one.

Q Has the Mushroom Council ever raised the assessment rate?

A No.

Q What has been the discussion with respect to why not?

A Well the conversation has been, "Let's wait till we see some results." It's a quarter-cent, it started at a quarter-cent; it could have gone from a quarter-cent to a third of a cent to a half a cent [3-651] to one cent. So it's only half of what it could be right now.

And obviously, if the Council members thought that there was enough industry support, they would have optimized the level of assessment. Next year you go to one cent. We're in the process now of developing a budget for next year.

I can't see any scenario where it would go higher than a half-cent, and it could be at one cent. And I can't give you each individual Council member's background

for why they think there's not enough support. Obviously, I want us to make sure that every dollar that we collect is spent in a way that will—because we are held accountable.

So I want to see the program before we raise the assessment.

Q And, at this point in time, you have to pay it; correct?

A We do.

Q So you want to make sure that it's spent the best way you think it should be spent?

A Certainly.

Q Do you believe that growth in the fresh mushroom industry is naturally occurring?

A Certainly.

[3-652]

Q The per capita consumption, why is that harder to achieve than increased sales?

Now, increased sales increases your profits; correct?

A Uh-huh.

Q Per capita consumption may or may not increase your profits but it could. But why is it harder to increase per capita consumption based on the demographics in the United States?

A The population segments that are growing the most dramatically, Hispanics, don't include mushrooms in their daily diet. So, as the population of the non-Hispanic slows, the per capita consumption will be hard to increase.

I think that's why—looking backward, I think that's why the Council members took such a small gain in per capita consumption from 1.9 to 2.1 for the full five years of the program.

Q Can the amount of the Mushroom Council assessment reduce the amount Pictsweet can spend in its mushroom efforts?

A It can't reduce what we spend on our market programs.

Q You are going to spend that anyway; correct?

[3-653]

A Certainly.

Q Could it have an impact on your expansion?

A Well, I guess at some point the assessment would be such a burden that we'd have to curtail some of our activities such as capital improvements, but that would have to be judged on a year-by-year basis. I couldn't say today that would happen but, obviously, if the burden of the assessment grew, we'd have to look at our total operations.

Q Now based upon the assessment rate that has been prevalent in the last—since they formed the

Commission, does Pictsweet just consider that as a tax that comes off the bottom line?

A Certainly.

Q You make less money because of that tax?

A Right.

Q Although it's statutory, does the Mushroom Council allow Pictsweet to receive a credit for any amounts of money that you spent promoting your mushrooms?

A No.

Q And do you believe that your monetary efforts in promoting your mushrooms has increased consumption?

[3-654]

A Well, sure, we wouldn't do it if it didn't.

Q Since there is this program that's mandatory if you produce more than a half a million, do you believe that the growers that produce less than a half-million pounds should also pay?

A Well, they get a free ride. They benefit by it.

Q Do you believe that the processors of mushrooms should pay an assessment?

A I always have.

Q Why is that?

A They're getting the benefit of it.

Q Now can you describe why you believe that the processors get a benefit out of the fresh mushroom assessment?

A Well, if the program is successful, if it is successful, total mushrooms—or the way the consuming public perceives mushrooms will have to improve. And if it improves fresh, it's going to improve all forms it would seem to me.

Q Now have you seen the processed mushroom people benefit from any price increase in the fresh sales?

A I don't think I understand that question; [3-655] ask it again.

Q Have you seen any of the processed mushroom people receive a benefit from the price of fresh sales?

A No.

Q Have you seen that—it was mentioned yesterday, let me bring up a situation.

Do you recall when a major mushroom producer called Moonlight went out of business?

A I sure do.

Q Okay, what happened?

A I believe, in 1993, they had a labor dispute and that led to a decision to close that farm. I believe the last day or the last month of business was December of 1993. And they were producing at that time about 35 million pounds a year. In the preceding years, they had produced as many as 50 million pounds.

Q In one location.

A The largest single operation in the country.

Q Okay. What happened when they closed down?

A They closed down, the sales for those pounds were distributed among, I assume, other growers in the Pennsylvania area. Nationally, I think there [3-656] was a perceived shortage of mushrooms and probably a real shortage in some markets.

The fresh price, I understand, in the east—we don't sell there, but I understand that it had a marginal increase. The price of last resort, the price that Campbell's would post or Monterey would post or somebody that would post a price and buy at that price on the given week, any given week, that price doubled, that price went from the 30-something cent range to the 60-something cent range.

Obviously, when Campbell's needs mushrooms for mushroom soup, they're going to procure them.

Q So is it true that the higher—the more demand there is for the fresh, the higher the price of the processed mushrooms go up?

A Certainly.

Q So the sellers into the process market will receive a benefit from the shortage of supply of the processed mushrooms?

A There are three categories of growers; there's growers like—I suspect there's some growers in northern California that sell everything to retailers and

maybe some wholesalers. There are growers in Pennsylvania that sell nothing but [3-657] processor markets, they have contracts with Campbell's; with Giorgio, which is a large processor; and their entire crop goes the processing route.

Then there's those in between like most everyone else who sell fresh, some processed contracts, and then the processor of last resort.

So when the supply went down dramatically, the big gainers were those growers that just grew for the processing market.

Q So the flip side of the same coin is, if the demand increases for fresh, the demand will increase for the processed?

A Right.

Q Do you believe that the people that sell the processed should pay an assessment?

A Yes, I do.

Q Are any of the other fruits and vegetables that Pictsweet sells required to pay an assessment for promotion programs?

A No.

Q Mushrooms is the only one?

A Only one.

Q Now you were present when Dr. Ward testified regarding some of the criteria that he looks at to

determine a rule of thumb as to whether or not a [3-658] generic program would work?

A I was present.

Q One of the things he stated that a generic program would work if it's a homogenous product; did you hear him testify to that?

A He did.

Q Do you believe that mushrooms, as sold in the marketplace today, are homogenous?

A No, they're not homogenous, there's different varieties, there's mushrooms that are called exotics that sell for $3-4.00 a pound, there is levels of service that are attached to all mushrooms that make their value different and make them non-homogenous. Different forms, different levels of service, different varieties—

Q Packaged differently?

A Different package types and styles.

Q One of the things you heard from one of the studies that was done by one of the groups is that some consumers didn't like the fact that they have to slice mushrooms; correct?

A Right.

Q You do provide that service; correct?

A We have sliced mushrooms in our line. It amounts to about ten percent of our total sales now.

[3-659]

Q Okay. So you have satisfied that demand for those consumers without the Mushroom Council?

A Right.

Q Now one of the other points that he brought up is that, for the program to work, it should be like the same grades and standards because, if you have a super good quality and a real poor quality based upon different grades, the generic program is less likely to work; did you hear that testimony?

A Right.

Q Now could you explain mushrooms as it fits into that criteria?

A Mushroom quality is subjective. You have a No. 1 product and what could be a No. 1 for grower-A might not be what another grower would think would be a No. 1 product.

You have product—you have mushrooms that are picked today that are No. 1, they don't sell today, if they're held in the cooler for a day or two, they might be downgraded. They might not look as good, they might darken, they may change, very different ideas about the quality based upon the eyes of evaluator.

Q Have you found that that downgrading in the quality, turning brown and those types of things, [3-660] does affect the consumption or the sales of that product?

A Certainly. Certainly; it's an impulse item. If it doesn't look good in the cabinet, people won't buy it. They won't; they won't buy it. It's not an essential part of their life and their diet.

Q Now he also discussed the fact that a generic program won't really work if you have a person in the industry that has the monopoly or the—oligopolistic; did you hear his testimony regarding that?

A I did.

Q Now, in the mushroom industry that is not true with respect to the entire nation; is that correct?

A That's right.

Q Is it regionally?

A In every market that we participate in there is a very limited number of growers. If I would look at each market individually, and I guess I should just to explain who our competitors are or how many competitors there are, because it varies by market.

In L.A., San Diego, southern California, there's three of us that have 95 percent of the business and the other five percent, one, sometimes [3-663] assume that they have a variety of sole-supply customers and majority positions and minority positions, just like we do with the few growers that we have in our markets.

Q And what about New Orleans?

A I would think—and I don't know this, I've been in the New Orleans market, Monterey has a farm in east

Texas and, given the geographic area, I'm sure they have a preponderance of that market.

Q Now you mentioned barriers to entry and one of the things Dr. Ward stated, that the barriers to entry are high, it is more difficult to have—a generic program is more likely because, as he explained it, that, if the price is increased, it's harder to take advantage of that price increase because of—

A I understood him to say that.

Q —cost to get in there. Did you hear him testify to that?

A Yes.

Q Explain that as far as mushrooms go.

A Well, I'm going to give you an example.

Moonlight went out of business in December of 1993. There was an immediate in reduction in supply of 35 million pounds. Now those growers who [3-664] participate in that northeastern market who are on the Council—I don't know many others except the Council Members—they told me that there was growing space that was not in production that made up 20 million pounds three months after Moonlight shut down.

We personally have the ability to increase our square footage on a short-term basis, three or four months.

Q And is that where most of the capital investment has already been put out, you just have some excess space available?

A Well, in Pennsylvania, as I understand it, they had some rooms out of service, they would have to improve the quality of the air handling in those rooms, improve the quality of the bed structures, and that's just the carpentry work and buying some air conditioning.

Q Now if, for example in the mushroom market, you have some excess capacity that you're not using right now; correct?

A That's right.

Q Okay. If you saw that mushrooms that you only got $1.29 a pound for all of a sudden went to $1.59 and you saw that, would you grow more?

A We would grow more. We are growing more [3-665] now. I mean we are continuing to bring our level of production up through improved growing techniques, through improved air handling, and we have some space that we could add. As we go, we will be adding it. If we saw a sharp spike in our opportunities to sell mushrooms, we'd have the space up in just a few months.

Q Okay. And the space that you already have but perhaps you're not actually growing mushrooms, how long will it take you to get that extra production if today you decided, let's grow some more?

A I'm going to make the assumption that the hardware is on the shelf, and it more than likely is, four months. If it's manufactured air handling equipment, six, seven months.

Q As opposed to like in tree fruit, it takes seven years to get a tree up to production.

A That's what I've heard in this room, yes.

Q Okay.

A Right.

Q And have you seen short-term responses to price increases?

A What do you mean by short-term responses? From whom?

Q Well, on these price increases, getting [3-666] back to what we're doing, that, if there is a shortage, we know, based upon what you stated, you could have —you could fill that void within a few months with the space that's currently available.

A Uh-huh, right.

Q So I guess it's probably my same question that there is a short-term response.

A Well, the Moonlight is a real, live example that everyone knows about in this industry. They went out of business; within a matter of weeks, production increased to make up half of that. And I'm sure that, if they had stayed out of business, there would have been other space that would have gone in that would have made the entire national supply the same as it was before.

Q If a vote was held today as to whether or not the program should be terminated, how would you vote?

A We'd vote to terminate the program.

Q You think you can do a better job with that money than the Council can?

A We've said it all along, I still believe that.

MR. LEIGHTON: Nothing further, Your Honor.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

---

MPRCIA Docket No. 96-0001

IN RE: UNITED FOODS, INC.,
A DELAWARE CORPORATION, D/B/A
PICTSWEET MUSHROOM FARMS, PETITIONER

---

[Filed: Aug. 1, 1996]

---

**SUMMARY OF TELEPHONE CONFERENCE**

In an August 1, 1996, telephone conference with Brian Leighton and Gregory Cooper, counsel for the parties, I told counsel that it appears that this matter is similar factually to the case of Donald B. Mills, Inc., MPRCIA Docket No. 95-0001, which I decided on April 26, 1996, and reconsidered by written decision on June 12, 1996. I proposed that, based upon stipulated facts, I render a decision which would be similar to the Mills decision and then if it is decided upon appeal, as respondent contends, that my decisions are erroneous, the decision in this case along with the Mills decision could be reversed.

Mr. Cooper recommended that I stay this matter pending guidance of appellate courts. Mr. Cooper stated that the facts in this case may be somewhat different and that in Mills it did not contest testimony by United Foods because it did not feel like as much was at stake with respect to United Foods. Mr. Leighton stated that essentially my decision in Mills

was that the government program was not effective and not narrowly tailored and that decision would apply regardless of how good or bad Pictsweet's program is.

Since there is a disagreement between counsel as to what facts, if any, need be decided in this matter, I directed counsel to brief the issues.

It was agreed that Petitioner will file a brief on or before September 3, 1996, and Respondent will file a brief on or before October 2, 1996. Petitioner's brief will state what facts, if any, I need find in order to render a decision in this case and why I can make such findings. Respondent will indicate what questions of fact must be decided before a decision can be made. Based upon these briefs, I will decide whether or not this case can be decided without hearing.

/s/ EDWIN S. BERNSTEIN
EDWIN S. BERNSTEIN
Administrative Law Judge

August 1, 1996

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
EASTERN DIVISION

---

Case No. 96-1252

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNITED FOODS, INC., DEFENDANT

---

Case No. 98-1082

UNITED FOODS, INC., PLAINTIFF

v.

UNITED STATE OF AMERICA, THE
UNITED STATES DEPARTMENT OF AGRICULTURE,
DEFENDANT

---

[Filed: July 9, 1998]

---

**AFFIDAVIT OF DONALD DRESSER**

Donald Dresser, being duly sworn, states under oath as follows:

1. I am the Executive Vice President of United Foods, Inc. ("United Foods"). I have been with United Foods since 1985. I received my undergraduate degree in economics from the California Institute of Technology. I received my law degree from Harvard Univer-

sity. Before I joined United Foods, I practiced law in the fields of antitrust and economic regulation.

2. I was the person primarily responsible for United Foods' acquisition of its mushroom business in 1987, and I am familiar with the operation of United Foods' mushroom business. Because of my background and my job responsibilities at United Foods, I am also familiar with the economics of the mushroom industry.

3. I am knowledgeable of the COMPLAINT FOR REVIEW OF AGENCY ACTION AND FOR DECLARATORY RELIEF filed by United Foods in this action "United Foods' Complaint"), and all facts stated in that Complaint are true and correct to the best of my knowledge, information and belief. The statements contained in United Foods' Complaint are incorporated herein by reference.

4. The mushroom industry is a competitive, unregulated industry. Other than regulations affecting food products generally, in the mushroom industry there are no regulations governing such matters as the quality or grades of mushroom products, packaging, advertising, pricing, production levels, or the orderly disposition of surplus product. There is no regulation of the mushroom industry that specifically controls the supply of or demand for mushroom products, competition within the industry, or the manner in which mushroom products are sold to the consuming public.

5. In 1990 Congress enacted the Mushroom Law, 7 U.S.C. §§ 6101-6112. Pursuant to the Mushroom Law, the United States Department of Agriculture (the U.S.D.A.) promulgated the Mushroom Promotion, Research, and Consumer Information Order at 7 C.F.R.

§§ 1209.200-.280 (the "Mushroom Order"). Under the Mushroom Order, there was formed a Mushroom Council, which is a committee of mushroom producers (some of whom are competitors of United Foods). The Mushroom Council exists to collect assessments from non-exempt mushroom producers, such as United Foods, and to use the monies so collected to develop industry-wide (i.e. nationwide) promotion, research and consumer information programs for mushrooms, ostensibly to stimulate the demand for fresh mushrooms.

6. The Mushroom Law is "free-standing" legislation, in the sense that it provides only for the compelled generic promotion and advertising of fresh mushrooms to the consuming public. The Mushroom Law does not contain any provisions for the regulation of any aspect of the mushroom industry, and it is not ancillary to any regulatory scheme designed to establish or maintain orderly marketing conditions for the industry.

7. In this action United Foods is challenging on First and Fifth Amendment grounds the constitutionality of the Mushroom Law, the Mushroom Order, and the actions of the Mushroom Council for essentially three reasons:

> First, United Foods disagrees with and objects to the message conveyed by the generic advertising and promotional programs implemented by the Mushroom Council. Among other things, these generic advertising and promotional programs portray mushrooms as a homogenous product, which they are not, and undercuts United Foods' advertising and promotional programs for its own mushrooms which attempt to describe mushrooms and the

services provided by mushroom producers as differentiated products.

Second, United Foods objects to the "free-rider" aspects of the Mushroom Order. Among other things, mushroom producers who produce less than 500,000 pounds of fresh mushrooms per year are exempt from assessments. Additionally, mushroom producers who sell their product into the processed mushroom market (as distinguished from the fresh mushroom market) are exempt from assessments on those sales. To the extent any benefit can be realized from the Mushroom Council's programs, those benefits will be enjoyed by these "free-riders" who are exempt from assessments. For reasons explained below, the processed mushroom producers potentially stand to realize greater benefits from the Mushroom Council's programs than fresh mushroom producers.

Third, United Foods objects to the Mushroom Council's programs because they are ineffective and serve no valid governmental interest.

To understand United Foods' objections to the Mushroom Order and the Mushroom Council's programs, it is important to understand the economic structure of the mushroom industry and United Foods' position in the industry.

8. Mushrooms are different from other agricultural products in several respects, including the following:

- Mushrooms are grown indoors in a controlled environment. Compared to other agricultural products, therefore, mushroom production is

not as influenced by weather conditions and other events beyond the producer's control.

- Because mushrooms are grown in a controlled environment, mushroom production is not seasonal except to the extent that consumer demand is seasonal. Mushrooms are grown throughout the year.

- In economic terms, the "supply curve" of mushrooms is more "elastic" than many other agricultural products. This means that the supply of mushrooms in the market will rise or fall relatively quickly in response to a rise or fall in prices. This is due primarily to the fact that mushrooms have a relatively short growing cycle (approximately three months), and most producers have surplus capacity which can be quickly employed to increase production in response to market conditions.

- Fresh mushroom sales are strongly influenced by the demographics of the marketplace. Because mushrooms are not a necessary part of the diet and are considered to be a kind of luxury food item, certain populations are significantly more inclined to purchase mushrooms than other populations; and for certain populations, sales or marketing efforts inevitably will be ineffective.

9. There are generally three types of markets for mushrooms: fresh mushroom markets; processed mushroom markets; and the "market of last resort." Fresh mushrooms are sold to retail grocery stores and will command the highest prices. Mushrooms for the pro-

cessed markets are initially sold to mushroom processors who will then process the mushrooms into such packaged products as canned mushrooms, freeze-dried mushrooms, mushroom soup, and the like. The "market of last resort" consists of large mushroom processors who are constantly in the market for surplus mushrooms at quoted prices that are typically well below the prices prevailing in the other markets. At any one time, fresh mushroom prices might be in the range of $1.20 per pound, prices in the processed mushroom market might be in the range of $0.80 per pound, and prices in the market of last resort might be in the range of $0.30 to $0.60 per pound or below. The prices in the market of last resort are below the cost of production.

10. Certain mushroom producers sell primarily to the fresh mushroom markets; others sell primarily to the processed mushroom market; and others sell to both markets. A producer who sells to the processed food market and/or the market of last resort will divert sales to the fresh mushroom market when market conditions change through either a decrease in the supply of or an increase in the demand for fresh mushrooms. United Foods sells its mushrooms to both the fresh mushroom and processed mushroom markets. Our sales into the processed mushroom market are to a relatively small number of regular customers. Like other mushroom producers, United Foods sells as little as possible into the market of last resort.

11. Fresh mushroom markets are regional, not national. Fresh mushrooms cannot be efficiently transported for long distances for a number of reasons: they have a short shelf life; they bruise easily when transported over long distances; and they are light weight

(or low in density and therefore bulky), which means that transportation costs are high when measured on a cost per pound basis. Fresh mushroom producers, therefore, must produce their mushrooms in the geographic areas where their regional markets are located. Thus, for example, United Foods owns and operates three mushroom plants which determine the three regional markets into which United Foods sells its product: (i) the Southern California and Arizona market surrounding United Foods' mushroom plant in Ventura, California; (ii) the Pacific Northwest market surrounding its mushroom plant in Salem, Oregon; and (iii) the Central Rocky Mountain States market surrounding its mushroom plant in Fillmore, Utah. United Foods sells no mushrooms east of Denver.

12. Each of the regional fresh mushroom markets is self-contained. In those markets where United Foods sells its product, the retail industry has been rapidly consolidating into a smaller number of larger grocery chains; and, therefore, the total number of United Foods' customers within its mushroom markets has become smaller.

13. Additionally, within each regional market, there are a relatively small number of competing producers. There are two or three principal producers in each of the markets where United Foods sells its product.

14. Fresh mushrooms are highly differentiated; they are not a homogenous product. There are different varieties of fresh mushrooms. Mushrooms of any particular variety will come in different sizes. Mushrooms from different producers vary according to freshness, color, texture, and other qualities important to retailers and consumers. Growing mushrooms is as much art as

science, and the nature and quality of mushrooms can be identified to the producer. Producers further differentiate and identify their product through brand names and different kinds and styles of packaging. Producers also differentiate themselves in the marketplace by the kinds and levels of service they provide their customers in connection with such matters as the delivery and marketing of their fresh mushrooms.

15. Because of the regional nature of the industry, fresh mushroom producers do not independently engage in nationwide marketing activities. United Foods, like other fresh mushroom producers, engages in independent marketing activities, at its own expense, that are tailored to each of its regional markets and the stores within each market. United Foods' marketing activities include in-store demonstrations, in-cabinet storage containers, specials, and advertising programs that are part of an individual store's advertising programs.

16. United Foods sells its mushrooms under its tradename "Pictsweet." United Foods' marketing activities are designed to promote the distinguishing qualities of its mushroom products and therefore to differentiate its mushroom products and services in the marketplace.

17. The Mushroom Council engages in "generic" promotional and advertising programs for fresh mushrooms. These generic programs talk about mushrooms generally and do not attempt to describe the differences among the various mushroom products that are sold in the marketplace. The Mushroom Council programs, consequently, portray mushrooms generally as an undifferentiated product. The Mushroom Council's

activities are national in scope, and the Mushroom Council therefore spends money to promote mushrooms in markets outside of United Foods' markets. A generic advertising or promotional program that may have a positive effect in one regional market or among one group of consumers may have a negative effect in another market or among other group of consumers.

18. Attached hereto as Exhibit A is the Management Report for 1997 issued by the Mushroom Council. This Report briefly describes the generic promotional and advertising efforts of the Mushroom Council, and it includes the Mushroom Council's most recent financial statement.

19. In order for a nationwide generic promotional or advertising program for any kind of product to be effective, several conditions must be present: (i) the product must be relatively homogenous; (ii) there must be a relatively large number of producers in each market or submarket competing against each other, which would make it difficult for individual producers to differentiate or distinguish their product in the marketplace; and (iii) the supply curve for the product must be relatively inelastic. Generic promotional or advertising programs also are more likely to succeed where the market is national in scope and where there is relatively little variation in the demand for the product among different population groups within the market. Additionally, a generic promotional or advertising program is more likely to be effective in a regulated industry where the generic advertising can compensate for the restrictions on competition that arise from the regulated nature of the industry.

20. These conditions are not present in the mushroom industry. For that reason, generic promotional and advertising programs cannot be effective in the mushroom industry.

21. As a matter of fact, the generic promotional and advertising programs developed by the Mushroom Council have had no discernible effect on the different fresh mushroom markets where United Foods conducts its mushroom business; and to the best of our knowledge, these programs have had no discernible effect on any of the other fresh mushroom markets in the United States. There are several reasons for this. First, as noted above, the conditions for an effective generic advertising program are not present in the fresh mushroom industry. Second, the funds generated through assessments are inadequate to promote fresh mushrooms on a nationwide scale. As reflected in Exhibit A, in 1997 the Mushroom Council's total expenditures were $2,307,506, and of that amount only $1,094,658 was spent on "promotion programs." Any nationwide program, to be effective, would cost tens of millions of dollars or more. Third, the Mushroom Council programs cannot assist producers like United Foods in differentiating their products or in providing better quality of product and service to customers, which is necessary to any successful marketing program. And, finally, the Mushroom Council programs, by definition, cannot regulate the regional markets or fresh mushrooms.

22. To the extent that any of the Mushroom Council programs may be effective in increasing overall demand for fresh mushrooms, it is reasonably likely that the benefit from any such increase in demand would be

realized primarily by producers other than United Foods who sell into the processed mushroom market and the market of last resort. Based on what has happened historically in the industry, if there were a general increase in the demand for fresh mushrooms, it can be reasonably expected that the producers who sell into the processed mushroom market and the market of last resort would divert their sales to the fresh mushroom market. This would have the likely effect of suppressing price increases in the fresh mushroom markets and of decreasing the supply in the processed mushroom markets, which in turn would increase the prices for mushrooms sold into the processed mushroom markets. The producers who sell in the processed mushroom markets, therefore, would realize the benefit from a general increase in demand for fresh mushrooms even though they are not being assessed for the costs of the generic marketing programs for the fresh mushroom market.

23. Most importantly, the Mushroom Council's generic promotional and advertising programs send a message to United Foods' current and prospective customers which tends to undermine the advertising and promotional activities of United Foods. The Mushroom Council's programs portray fresh mushrooms as a homogenous product, which is not true. By portraying fresh mushrooms in this manner, the Mushroom Council delivers a message which is contrary to the message United Foods is attempting to deliver to its customers.

24. United Foods, in its marketing programs, attempts to portray its fresh mushrooms, and the services which it provides to its customers, as unique,

which they are. United Foods attempts to dissuade customers from viewing mushrooms as a generic, homogenous product. This is an essential part of United Foods' marketing and advertising activities. Certain of United Foods' competitors cannot compete with the quality of United Foods' mushroom products and services. It would be in the interests of those producers to promote mushrooms as a homogenous product in an effort to diminish the competitive advantage that United Foods otherwise enjoys in the marketplace. The content of the Mushroom Council's programs, therefore, potentially serves the interests of United Foods' competitors, contrary United Foods' interests. United Foods does not agree with the message of the Mushroom Council, therefore, because the Mushroom Council's message conflicts with United Foods' fundamental business strategy.

FURTHER THE AFFIANT SAITH NOT.

/s/ DONALD DRESSER
DONALD DRESSER

Sworn to and subscribed before me,

BARBARA H. (illegible)

a Notary Public,

this the 7th day of July, 1998.

My commission expires: April 2, 2001

EXHIBIT A

[Seal Omitted]

# Annual Report

# 1997

[Seal Omitted] **MUSHROOM COUNCIL**

**2200-B Douglas Blvd., Suite #220, Roseville, California 95661**

## Management Report

1997 was arguably the most exciting year for the Mushroom Council since its inception. However, the ratification of the Order in March of this year was even more exciting as well very gratifying. The overwhelming response of the industry in the referendum clearly is an indication that the Council should continue on the course it set, and with renewed vigor. Significant actions taken by the Council in 1997 include:

- The development of a new strategy by KDS Marketing based on their evaluation of the overall program and consumer research, resulting in the "Perfect Partner" slogan and logo. This theme will be carried-out in a more focused approach to promotion and will tie all facets of the program together.

- A TV ad campaign was put in place with three flights during the year on various cable networks. The results indicate that the ads raised consumer awareness of our product and reinforced the theme that mushrooms are the perfect partner.

- Continuation of ongoing programs are in the areas of consumer public relations, retail trade promotion and foodservice promotion. Again, in all three areas the new theme was incorporated into all the promotion materials and messages.

- The Pennsylvania Department of Agriculture again partnered with the Council and contributed a grant in the amount of $100,000. This

significantly strengthened the foodservice program and allowed for much broader coverage.

- The Strategic Plan was reviewed and modified during the year in light of the ajustments to the direction of the program. The plan has served the Council well as a guide, as well as, a measure of progress.

- Compliance audits were carried out on a random basis on both fresh producers, first handlers and exempt producers. The results indicate that overall compliance is generally good. These audits will continue to insure that those required to pay assessments, in fact, do comply with the Order.

- Assessments were collected on 542,650,000 pounds of domestically-produced fresh mushrooms and 15,448,444 pounds of fresh imports during the year. Overall this represents an increase over 1996 of 37,350,000 pounds, and 7.4%.

- The annual audit of the Mushroom Council resulted in the unqualified opinion of the auditors that the books and records are in good order, and that the financial statements fairly present the financial results of the operations. A copy of the audit report, detailing Mushroom Council activities, is included with this report.

Please feel free to contact the Mushroom Council office or any Council member should you require additional information or have any questions.

Thank you, and we look forward to renewed prosperity in the mushroom industry.

/s/ EDWARD A. LEO
EDWARD A. LEO,
Chairperson

/s/ WADE WHITFIELD
WADE WHITFIELD,
President and CEO

# 1997 Promotion and Research Program

## Consumer Publicity Program

The 1997 consumer publicity program was designed to support and expand the reach of the Mushroom Council's product image—***"Fresh Mushrooms Make the Perfect Meal Companion"*** and educate consumers on the many ways to use and prepare fresh mushrooms. In all phases of the 1997 program—media placements, publicity events, collateral material—the *"Perfect Partner"* slogan/logo was incorporated.

During the year, five press releases supporting the *"Perfect Partner"* theme were distributed to 850 food-editors nationwide. The basic mailings included copy, recipes, color and Black and White photography. In addition, food editors also received a special memo describing the consumer research that led to the development of the *"Perfect Partner"* theme, an offer to send readers the menu planner leaflet, a copy of the official mushroom month proclamation and mushroom cultivation information. Also, in support of the *"Perfect Partner"* theme six placements were made with syndicated food writers whose columns are published in thousands of metro newspapers, as well as, two ready-to-print press releases with recipes and photos that ran in thousands of daily and weekly newspapers throughout the year.

A total of eight placements were made in food and consumer magazines in 1997. These included two full-color feature stories: one in *WOMAN'S DAY "Meals in Minutes"*; and the other in *HOME* magazine featuring mushroom recipes by Sacramento restaurateur Biba Caggiano.

Total potential readership for all editorial print placements including magazine readership was close to 170 million with an advertising cost equivalent of about $2 million if the space had been purchased for advertising.

Fourteen placements were made on National and Regional TV in 1997, most of them during ***National Mushroom Month*** in September. The NBC Today Show weatherman Willard Scott marked ***National Mushroom Month*** with a beautiful display of white mushrooms and an urging to "forage" in the supermarket. Regional TV Greengrocers Johnny Lerro, Michael Marks and Eric Sorensen also marked ***National Mushroom Month*** with spots that focused exclusively on white mushrooms. TV food chef "Mr. Food" showcased mushrooms on three of his nationally syndicated cooking vignettes. Noted cookbook author/ TV chef Nathalie Dupree served as spokesperson for the Mushroom Council in Atlanta, as did food historian/ author Betty Fussell on the ***TV FOOD NETWORK***. The ***HOME & GARDEN CHANNEL'S*** *"All in Good Taste"* devoted its 1/2 hour segment to mushrooms using information, recipe ideas and video footage supplied by the Mushroom Council. Burt Wolfe's *"A Taste for Travel"* in which fresh mushrooms were featured appeared three times on the ***TRAVEL CHANNEL*** during the year. Estimated potential viewership for all National and Regional TV placements was 68 million with an advertising cost equivalent of $1 million if the commercial airtime had been purchased.

Two recipe video releases were produced in 1997 and distributed to 125 TV Cable and broadcast stations to coincide with the first flight of the "*game show*" TV commercial. These two-minute cooking demos supported the "*Perfect Partner*" image with the logo appearing on the opening screen. Potential viewership is estimated at 23 million based on bounce-back cards and follow-up phone calls.

In addition to TV, a radio media tour was conducted during ***National Mushroom Month***. Renowned food authority/writer John Willoughby served as mushroom spokesperson on radio talk show interviews nationwide. He was heard on 60 stations, many in major markets including Los Angeles, New York and Boston.

***National Mushroom Month*** placements were made on four major web sites on the internet in *1997 The AOL Cooking Club, Electronic Gourmet Guide, MSN's Cooking Forum and Mimi's Cyberkitchen.* All placements consisted of multiple screens of mushroom information and recipes graphically incorporating the "*Perfect Partner*" logo.

Two programs in 1997 were targeted to the food professionals: the **Mushroom Practicum** in New York City, and the ***Mushroom Memo*** newsletter.

The Practicum was a discussion/demonstration and tasting focusing on white mushrooms led by John Willoughby and his co-author chef, Chris Schlesinger. It was held at Peter Kump's Cooking School and attended by 50 food editors from such publications as *GOOD HOUSEKEEPING, REDBOOK* and *FOOD & WINE*, as well as, freelance and syndicated food writers. Feedback was positive with comments such as the one

from an editor at *GOOD HOUSEKEEPING*—"The information will find its way onto our magazine food pages."

During 1997, three issues of the ***Mushroom Memo*** newsletter, designed to keep fresh mushrooms top-of-mind, were distributed to approximately 1,000 food communicators.

## Foodservice Promotional Program

The major objective of the ongoing foodservice program throughout 1997 was to increase fresh mushroom demand at both the distributor and operator levels. The target audience continued to be:

- Mid-scale Chain Operations
- White Tablecloth Independents
- Selected Contract Feeders
- Distributor Sales Representatives

The program elements included:

- Test Market Case Studies
- Collateral Material Development
- Ongoing Communications
  Newsletter
  Mushroom Council Web Page
- Trade Shows
- Trade Advertising
- Foodservice Public Relations

Four case studies were conducted in 1997. The purpose of the studies were to develop operator testimonials as to the profitability of fresh mushrooms. Sizzler, Inc. with 261 units participated in a national promotion during the fall quarter. The goal of the promotion was to increase ticket totals. **A *Top Your Steak*** promotion in which *Burgundy Mushrooms* were offered as an upsell on all steak orders resulted in permanent placement of the *Burgundy Mushrooms* on the menu. A second promotion was conducted with Garfield's Restaurants, a mall-based Southern and Midwest Region midscale chain. A *Mushroom Stuffed Steak* was offered that was higher in price than regular menu items. Ticket averages increased with many regular customers buying the *Mushroom Stuffed Steak.* The chain continued to use fresh white mushrooms to upsell ticket totals. The test included all 48 Garfield's units.

Flik International, a contract feeder servicing mainly B&I clients on the East Coast conducted a November promotion using fresh white mushrooms. A direct quote from one of the participating units stated, "*Interest and enthusiasm sparked by the use of fresh mushrooms far surpassed our expectations. We used them across the menu—grill line, hot food line, salad bar and take out service.*"

The Cadillac Ranch in Denver, Colorado conducted a ***Mushroom Madness*** promotion featuring special appetizers. The independent restaurant has made their mushroom appetizers a permanent menu item due to a 10 percent increase in customer sales.

New collateral material added to the Mushroom Council resource kit. Several new pieces included the ***Proof Is In the Profits*** fact sheet series, the ***Cost-per-Serving***

***Breakdown*** reference piece and a training video handout as an accompaniment to the existing foodservice video.

Ongoing distributor education included the quarterly foodservice newsletter renamed "***Shedding Light on Fresh Mushrooms***". The publication was distributed to 1,000+ distributor representatives quarterly.

Trade shows included: the Pizza Expo, National Restaurant Association Show and the PMA Foodservice Conference.

Foodservice advertising focused on case studies conducted in 1996. A full-page ad based on the Harris Ranch case study was placed in *RESTAURANT BUSINESS, FOODSERVICE NEWSLETTER* and *PRODUCE SOLUTIONS.*

Foodservice publicity placements were seen in nine publications including *CHEF, CHEERS, COOKING FOR PROFIT, PIZZA TODAY, PRODUCE SOLUTIONS, RESTAURANT BUSINESS, RESTAURANT HOSPITALITY, FOOD MANAGEMENT* and *FOODSERVICE DIRECTOR* magazines.

## Mushroom Council/Pennsylvania Joint Promotion

A joint promotion between the Mushroom Council and the Pennsylvania Fresh Promotion Committee was a part of the 1997 foodservice program. The Pennsylvania Department of Agriculture provided a $100,000 grant through the Pennsylvania Fresh Promotion Committee which was matched by $220,000 of Council funds to expand the overall foodservice program to $320,000.

The foodservice promotion category was evaluated as an area to benefit by the additional funds.

## Retail Trade Promotion Program

A number of new sales support tools were tested and introduced in 1997. All of these new elements were created under the "*Blueprint for Profit*" banner.

The trade promotion program has two principal areas of responsibility: keeping retailers focused on the profit potential represented by fresh mushrooms and reminding shoppers while in store, to add mushrooms to their purchases.

To keep retailers focused on mushrooms, a number of sales support programs were developed on behalf of the industry. Two new full-page ads were developed to reinforce key selling points. The first offered a data disk that permitted users to determine the optimum balance between their price paid, price sold and the resulting gross margin. The disk includes data from an actual (but unidentified) chain so that the disk user can see how the data was entered and analyzed, as well as,

a template for them to use to confirm their own experience.

The second ad reported the results of a test that was designed to determine the sales results from adding a second location of sliced mushrooms in the fresh-cut salad section. The test chain experienced just over a 10 percent sales increase as a result of this new facing in a secondary location.

The trade ads were supported by a series of press releases that went out through the year, as well as, by a semi-annual retailer newsletter that ran as an insert in *Produce Merchandising.*

As new materials were developed, they were sent by direct mail to a list of nearly 400 V.P.-level produce buyers and merchandisers. An accompanying order form encouraged recipients to send for quantities of these free materials for in-store use. Two particularly popular tools were a slide rule to help determine mushroom profitability and a CD-ROM that contains all of the graphics needed to produce retail Best Food Day ads.

The fresh mushroom story was presented at a number of industry gatherings. These events included sponsorship of an Eastern Produce Council dinner, Fresh Produce Council (Southern California) luncheon, and a New England Fresh Produce Council dinner meeting. In addition, we had a booth at PMA and Fresh Produce Retail Expo and attended the Annual Produce Conference and Mexican-American Grocers' Convention.

Our in-store shopper communication program continues to rely heavily on in-store radio. Every 15 minutes the

music in the store stops and shoppers are reminded that fresh mushrooms go with almost everything. The voice and copy strongly reinforce the cable television campaign "*Perfect Partner*" message, in an effort to build additional awareness for the positioning. Sales data was collected from a Southern California chain that consistently reports an average 10 percent month-to month increase in fresh mushroom sales. . . which they principally attribute to the in-store radio.

The Council continues to gather fresh mushroom sales trend data from six cooperating retailers across the country. Inferences that can be drawn from these data will be compiled and shared with the industry during the 1998 year.

To better conform to the new positioning for "*Fresh mushrooms—The Perfect Partner*" the retail trade program will change from "*Blueprint for Profit*" to "*Partners in Profit.*" This solidly supports the "*Perfect Partner*" theme.

## Council Web Site

By the end of 1997, more than 15,000 visitors had accessed the Council web-site. It contains product information, color and B & W line art, recipes and consumer information to help users find new ways to use fresh mushrooms. It also contains information for food-service users, educators, and the consumer press. The site location is ***www.mushroomcouncil.com***.

## Consumer Image Promotion Program

The major marketing research effort conducted by the Council in 1996 and 1997 resulted in our product

position, the foundation for all consumer promotion of fresh mushrooms. Consumers believe that fresh mushrooms "make the perfect meal companion" and when reminded of this position in image advertising and public relations, are motivated to increase their consumption of our product. The 1997 Consumer Image Program was implemented to achieve this singular goal—increase consumer awareness that fresh mushrooms are "*The Perfect Partner*" for almost anything.

The cornerstone of the 1997 promotion was a television advertising campaign. Built on "*The Perfect Partner*" strategy and other research on creative impact, two versions of a TV commercial were produced in the first quarter. A "game show" design played off the success of "*Family Feud*" type programming and drove home the key product benefit of versatility. One, thirty-second (standard TV time) spot to establish the primary image was supplemented by a ten-second version to increase frequency and maximize the media budget.

The total TV campaign consisted of three separate flights of advertising during the year, running on six national cable networks. Launched in the spring for a four-week period, the commercials were re-aired for two weeks to support summer sales and ran another four-week period during the fall. Over twenty-five percent (25%) of our total target audience of fifty-two million women saw our commercial over three times (on average) on *TNT*, *TBS*, *DISCOVERY*, *LIFETIME*, *THE LEARNING CHANNEL* and THE FOOD NETWORK.

Another key element of the consumer promotion program was integration. Wherever and whenever a consumer saw or heard a fresh mushroom message, it

was based on "*The Perfect Partner*" image. Integration increases the impact and efficiency of the overall program. Supporting the television campaign, a meal planner was developed to help our consumers who more and more struggle with the decision over "What's for dinner?", make those decisions while shopping. Over a million brochures providing quick and easy recipes were delivered to retailers coordinated with the TV flights. In addition, three retail mailings were sent to key decision makers announcing the next wave of promotional support by the Council to encourage coordination of their in-store programs for fresh mushrooms. Producers received each announcement to retailers and received a weekly schedule on the Council's FAX Alert.

The goal of the 1997 image promotion to increase consumer awareness of our product position was measured by an Advertising Tracking Study. This standard marketing research tool, employing a telephone questionnaire methodology, was implemented prior to the spring launch of the program. Benchmark numbers were collected on a variety of parameters including usage and attitudes, as well as, general and specific awareness of our promotional message. The study was repeated in the fall after conclusion of our program. Final analysis showed a twenty-five percent (25%) increase in audience attitude and consumption of fresh mushrooms. "*The Perfect Partner*" image is helping achieve our industry goal to increase consumption of fresh mushrooms.

## Crisis Management

The Council developed a comprehensive crisis management plan in early 1996. The purpose is to have a well

thought-out plan in place in case of any situation that might arise that would erode the confidence of consumers in fresh mushrooms that are consumed in the household or in eating establishments away from home.

The plan includes a management team that would immediately swing into action. The team consists of Council management and appropriate experts in all fields related to a given crisis. Lists of retailers, wholesalers, foodservice distributors and operators, federal and state health organizations and others deemed appropriate to bring on to the team are maintained.

The plan positions the Mushroom Council as the organization to take the lead in situations effecting the industry.

# 1997 Council Members

| | |
|---|---|
| Ed Leo, Chairperson* ..... John C. Leo & Son | Region 2 |
| Shah Kazemi, Vice-Chairperson** ..... Monterey Mushrooms, Inc. | Region 3 |
| William K. Street, Treasurer ..... Ostrom Mushroom Farms | Region 3 |
| Virgil Jurgensmeyer, Secretary ..... J-M Farms | Region 4 |
| James Angelucci ..... Phillips Mushrooms | Region 2 |
| Roger Claypoole ..... Creekside Mushrooms, Ltd. | Region 2 |
| Wihelm W. Meya ..... Franklin Mushrooms, Inc. | Region 1 |
| Dr. Robert E. Miller*** ..... Campbell's Fresh, Inc. | Region 1 |
| C. Douglas Tanner ..... Sunrise Mushrooms | Region 3 |

---

* Assumed Chairperson responsibilities on August 1, 1997.

** Elected Vice-President-Chairperson on July 31, 1997.

*** Resigned as Chairperson and Council member on July 31, 1997.

## Council Staff

Wade A Whitfield; President
Robyn Cuevas, Public Relations Director
Lisa Champney, Office Manager

NOTE-STATES BY REGION:

**REGION 1** - Maine, Vermont, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Ohio, Kentucky, Indiana, Michigan, Wisconsin, Illinois, Missouri, Iowa, Nebraska, Kansas, Minnesota, North Dakota, South Dakota, Montana, Colorado, and Wyoming.

**REGION 2** - Pennsylvania, Delaware, New Jersey, the District of Columbia, West Virginia, Virginia, and Maryland.

**REGION 3** - Washington, Oregon, Idaho, Utah, Arizona, California, Nevada, Alaska, and Hawaii.

**REGION 4** - New Mexico, Texas, Oklahoma, Arkansas, Louisiana, Alabama, Mississippi, Georgia, Tennessee, North Carolina, South Carolina, Florida, Puerto Rico.

TENNEY AND COMPANY

Certified Public Accountants

## INDEPENDENT AUDITORS' REPORT

We have audited the accompanying general purpose financial statements of the Mushroom Council, an instrumentality of the United States Department of Agriculture, as of December 31, 1997, as listed in the table of contents. These financial statements are the responsibility of the Mushroom Council's management. Our responsibility is to express an opinion on these financial statements based on our audit.

We conducted our audit in accordance with generally accepted auditing standards and Government Auditing Standards, issued by the Comptroller General of the United States. These standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentations. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the general purpose financial statements referred to above present fairly, in all material respects, the financial position of the Mushroom Council as of December 31, 1997 and the results of its opera-

tions for the year then ended in conformity with generally accepted accounting principles.

March 18, 1998

Tenney and Company

**1130 Civic Center Blvd. Ste. C Yuba City, California 95993**
**(530) 674-4211 Fax (530) 674-4215**

**MUSHROOM COUNCIL**
**BALANCE SHEET**
**AS OF DECEMBER 31, 1997**

| | General Fund | General Fixed Assets Account Group | December 31, 1997 |
|---|---|---|---|
| ASSETS | | | |
| Cash | $ 668,184 | $ | $ 688,184 |
| Accounts receivable | 291,977 | | 291,977 |
| Fixed assets | | 28,185 | 28,185 |
| Total Assets | $ 960,161 | $ 28,185 | $ 988,346 |
| LIABILITIES AND FUND EQUITY | | | |
| Accounts payable | $ 128,843 | $ | $ 128,843 |
| Deferred compensation | 364 | | 364 |
| Due to USDA (see Note 6) | 73,990 | | 73,990 |
| Total liabilities | 203,197 | | 203,197 |

| | | | |
|---|---|---|---|
| Fund Equity: | | | |
| Investments in general fixed assets | | 28,185 | 28,185 |
| Reserve for encumbrance | 18,521 | | 18,521 |
| Fund Balance: | | | |
| Unreserved | 738,443 | ____ | 738,443 |
| Total fund equity | 756,964 | 28,185 | 785,149 |
| Total Liabilities and Fund Equity | $ 960,161 | $ 28,185 | $ 988,346 |

The notes to the financial statements are an integral part of this statement.

See accompanying independent auditors' report.

**MUSHROOM COUNCIL**
**COMBINED STATEMENT OF REVENUES,**
**EXPENDITURES AND CHANGES IN FUND BALANCES**
**FOR THE YEAR ENDED DECEMBER 31, 1997**

| | General Fund |
|---|---|
| Revenues | |
| Assessments | |
| Domestic | $ 2,483,902 |
| Imports | 69,518 |
| Interest | 10,013 |
| Product sales | 25,654 |
| Miscellaneous | 10,368 |
| Grants | 100,000 |
| Total revenues | 2,699,455 |
| Expenditures | |
| Conferences/conventions | 12,670 |
| Industry program support | 12,250 |
| Office expense | 68,709 |
| Other operating expense | 30,768 |
| Payroll costs including taxes | 155,474 |
| Promotions - staff cost | 96,442 |
| Professional services (including compliance audits) | 39,975 |
| Promotion programs | 1,094,658 |
| Product, image development | 638,297 |
| Travel | 44,719 |
| Government expenses (see Notes 6 & 7) | 57,871 |
| Crisis management | 4,017 |
| Industry materials production | 15,405 |
| Program evaluations | 36,251 |
| Total expenditures | 2,307,506 |

| | |
|---|---|
| Excess of revenues over (under) expenditures | 391,949 |
| Fund balance unreserved December 31, 1996 | 349,015 |
| Fund balance unreserved – subtotal | 740,964 |
| Increase in reserve for encumbrances | ( 2,521) |
| Fund Balance Unreserved December 31, 1997 | $ 738,443 |

The notes to the financial statements are an integral part of this statement.

See accompanying independent auditors' report.

**MUSHROOM COUNCIL**
**COMBINED STATEMENT OF REVENUES, EXPENDITURES AND CHANGES IN FUND BALANCES - BUDGET AND ACTUAL FOR THE YEAR ENDED DECEMBER 31, 1997**

| | Actual | Budget | Variance Favorable (Unfavorable) |
|---|---|---|---|
| Revenues | | | |
| Assessments | | | |
| Domestic | $ 2,483,902 | $ 2,300,000 | $ 183,902 |
| Imports | 69,518 | 54,000 | 15,518 |
| Interest | 10,013 | 10,000 | 13 |
| Product sales | 25,654 | 25,000 | 654 |
| Miscellaneous | 10,368 | 5,000 | 5,368 |
| Grants | 100, 000 | 100,000 | ____ |
| Total revenues | $ 2,699,455 | $ 2,494,000 | $ 205,455 |
| Expenditures | | | |
| Conferences/ conventions | 12,670 | 11,000 | ( 1,670) |
| Industry program support | 12,250 | 12,550 | 300 |
| Office expense | 68,709 | 70,700 | 1,991 |
| Other operating expense | 30,768 | 34,300 | 3,532 |
| Payroll – including taxes | 155,474 | 158,500 | 3,026 |
| Promotions – staff cost | 96,442 | 114,400 | 17,958 |
| Professional services | 39,975 | 51,000 | 11,025 |
| Promotion programs | 1,094,658 | 1,077,000 | ( 17,658) |

| | | | |
|---|---|---|---|
| Product image development | 638,297 | 628,000 | ( 10,297) |
| Travel | 44,719 | 52,000 | 7,281 |
| Government expenses (see Notes 6 & 7) | 94,913 | 151,657 | 56,744 |
| Crisis management | 4,017 | 5,000 | 983 |
| Industry materials production | 15,405 | 10,000 | ( 5,405) |
| Research | 36,251 | 50,000 | 13,749 |
| Program evaluation | | 50,000 | 50,000 |
| Promotion/ contingency reserves | | 422,469 | 422,469 |
| Total expenditures | 2,344,548 | 2,898,576 | 554,028 |
| Excess of revenues over (under) expenditures | 354,907 | ( 404,576) | 759,483 |
| Add back USDA startup fee debt payments in 1997 included above in Government Expenses | 37,042 | | 37,042 |
| Fund balance unreserved December 31, 1996 | 349,015 | 349,015 | ___ |
| Fund balance unreserved - subtotal | 740,964 | ( 55,561) | 796,525 |

| | | | |
|---|---|---|---|
| Increase in reserve for encumbrances | ( 2,521) | | ( 2,521) |
| Fund Balance Unreserved December 31, 1997 | $ 783,443 | ($ 55,561) | $ 794,004 |

The notes to the financial statements are as integral part of this statement.

**SEE ACCOMPANYING INDEPENDENT AUDITORS' REPORT.**

**MUSHROOM COUNCIL**
**NOTES TO THE FINANCIAL STATEMENTS**
**DECEMBER 31, 1997**

The accounting methods and procedures adopted by the Mushroom Council conform to generally accepted accounting principles as applied to governmental entities. The following notes to the financial statements are an integral part of the Mushroom Council's General Purpose Financial Statements.

1. Summary of Significant Accounting Policies

Financial Reporting Entity

The Mushroom Council is authorized by the Mushroom Promotion, Research, and Consumer Information Act of 1990 (P.L. 101-624). The Council is considered an instrumentality of the U.S. Department of Agriculture which conducts the administrative oversight of its activities.

The Council commenced activity in August of 1993. The Council is funded by assessments collected from producers and importers who produce or import, on average, over 500,000 pounds of mushrooms annually that are marketed or imported for fresh use. The Council was formed for the purpose of mushroom promotion, research and to provide consumer information. The Council is governed by a board appointed by the Secretary of Agriculture. The board consists of at least four members, but not more than nine.

Basis of presentation—fund accounting. The accounts of the Mushroom Council are organized on the basis of funds and account groups, each of which is considered a separate accounting entity. The Council has a General Fund and a Fixed Asset Account Group. Each fund is accounted for by a separate set of self-balancing accounts that comprise its assets, liabilities, fund balance, revenues, and expenditures/expenses. Individual funds account for the governmental resources allocated to them for the purpose of carrying on specific activities in accordance with laws, regulations, or other restrictions.

General Fund: This fund is established to account for resources devoted to financing the general services of the Council. General assessments and other sources of revenue used to finance the fundamental operations of the Council are included in this fund. The fund is charged with all costs of operating the government entity for which a separate fund has not been established.

General Fixed Assets Account Group: This is not a fund but rather an account group that is used to account for general fixed assets acquired principally for general purposes and excludes fixed assets in any Enterprise Funds or Internal Service Funds.

Basis of accounting Governmental funds use the modified accrual basis of accounting. Under this method, revenues are recognized in the accounting period in which they become both available and measurable (flow of current financial resources measurement focus). Miscellaneous revenues are re-

corded as revenues when received in cash. Assessments and investment earnings are recorded when earned (when they are measurable and available). Expenditures are recognized in the accounting period in which the fund liability is incurred, if measurable.

Budgets and the budgetary process. The Council adopts an annual operating budget, which can be amended by the Council, with USDA approval, throughout the year. Formal budgetary accounting is employed as a management control for all funds of the Council. For each of the funds for which a formal budget is adopted, the same basis of accounting is used to reflect actual revenues and expenditures recognized on the basis of generally accepted accounting principles.

Receivables. All receivables are reported at their gross value and, where appropriate, are reduced by the estimated portion that is expected to be uncollectible.

Property, plant, and equipment. Fixed assets used in governmental fund type operations are accounted for in the General Fixed Assets Account Group. Public domain (infrastructure) general fixed assets consisting of certain improvements other than buildings, such as roads, sidewalks, and bridges, are not capitalized. Property, plant, and equipment acquired or constructed for general governmental operations is recorded as an expenditure in the fund making the expenditure and capitalized at cost in the General Fixed Assets Account Group.

Fund Equity. The unreserved fund balances for governmental funds represent the amount available for budgeting future operations. The reserved fund balances for governmental funds represent the amount that has been legally identified for specific purposes. Unreserved retained earnings for proprietary funds represent the net assets available for future operations or distribution. Reserved retained earnings for proprietary funds represent the net assets that have been legally identified for specific purposes.

The reserve for encumbrances was created to represent encumbrances outstanding at the end of the year based on purchase orders and contracts signed by the Council but not completed as of the close of the fiscal year.

Revenues and expenditures/expenses. Revenues for governmental funds are recorded when they are determined to be both measurable and available. Generally, tax revenues, fees, and nontax revenues are recognized when received. Grants from other governments are recognized when qualifying expenditures are incurred. Expenditures for governmental funds are recorded when the related liability is incurred.

2. Cash

At December 31, 1997, the Council had deposited with Bank of America:

| | |
|---|---|
| Checking Account | $ 12,058 |

| | |
|---|---|
| Savings | 656,126 |
| Total | $ 668,184 |

All bank deposits as of the balance sheet date are insured or collateralized with securities held by the Council's agent and approved by the USDA.

3. Accounts Receivable

At December 31, 1997 receivables consisted of assessments primarily for December's sales of mushrooms by handlers. All the receivables were subsequently collected in January and February of 1998.

4. Property, Plant and Equipment

| | Balance 12/31/96 | Additions | Deletions | Balance 12/31/97 |
|---|---|---|---|---|
| Equipment | $ 28,185 | $___ | $___ | 28,185 |

5. Operating Lease

The Council is obligated under certain leases accounted for as operating leases. Operating leases do not give rise to property rights or lease obligations, and therefore, the results of the lease agreements are not reflected in the Council's account groups. The following is a schedule of future minimum rental payments required under operating leases that have initial or remaining noncancelable lease terms in excess of one year as of December 31, 1997:

| | Pitney Bowes Postage Meter | Office Building |
|---|---|---|
| 1998 | $ 586 | $ 31,416 |
| 1999 | -0- | 10,576 |
| 2000 | -0- | -0- |
| 2001 | -0- | - 0- |
| Total Remaining | $ - 0- | $ -0- |

6. Due to USDA

The USDA incurred initial start up costs during 1991 through 1993 totaling $277,717 to create the Mushroom Council. The Council has arranged with the USDA to pay these costs back over a sixty month period. At the balance sheet date, $73,990 remained to be paid as follows:

| | Minimum Payments |
|---|---|
| 1998 | $73,990 |
| Total Remaining | $ - 0 - |

7. Government Expenses

| | |
|---|---|
| AMS User Fees: | |
| Paid as of 12/31/97 | $ 50,245 |
| US Customs General Counsel User Fees | |
| Paid as of 12/31/97 | 618 |
| Total Expenses For 1997 | 50,863 |

| | |
|---|---|
| AMS User Fees: | |
| Paid in 1997 for 1996 | 7,008 |
| | 57,871 |
| Government Implementation Repay: | |
| Paid in 1997 | 37,042 |
| | 94,913 |
| Compliance auditing services paid in 1997 - included in professional services | 31,000 |
| Costs Paid During 1997 | $ 125,913 |

For budget purposes, government implementation funds to be repaid in a year are included in the budget. Therefore, for the comparison of budget and actual cost, actual government implementation funds (Due to USDA) are included in expenses and adjusted in the fund balance section of page 4.

8. Encumbered Funds

Due to USDA - 1997 - Paid in 1998 $ 18,521

Mushroom Council makes the requisite payments to USDA as they are billed by USDA. Four payments for 1997 totaling $18,521 were billed to the Council after December 31, 1997.

9. Subsequent Events

Two producer-handlers have filed administrative adjudicatory actions under 7 U.S.C. 6106 challenging the whole program on constitutional

grounds. Subsequently, the U.S. Supreme Court has ruled in favor of the Mushroom Council law. However, the specific actions noted herein are in the process of working their way through the appeals process. The accounts receivable on Page 2 of this report do not include amounts due from the two parties who have challenged the constitutionality of the Mushroom Council.